Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

SANTEE SIOUX TRIBE OF NEBRASKA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Do the scope of gaming provisions of the Indian Gaming Regulatory Act of 1988 incorporate the entire corpus of state law and regulations for purposes of tribal-state compact negotiations?

2. Are the Class III gaming provisions of the Indian Gaming Regulatory Act of 1988 valid in light of this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that the compact enforcement provision of IGRA is unconstitutional?

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The Decision of the Chairman of the National Indian Commission on Expedited Review in Ref. No. CO-96-01, dated May 2, 1996, is not reported and is reproduced in the Appendix.

The District Court's Amended Judgment, entering judgment in favor of the Santee Sioux Tribe of Nebraska, dated July 12, 1996, and the District Court's Findings of Fact and Conclusions of Law, dated July 10, 1996, are not reported and are reproduced in the Appendix.

The decision of the National Indian Gaming Commission in the Matter of Santee Sioux Tribe of Nebraska, Ref. No. NOV-96-01 and Ref. No. CO-96-01, dated July 31, 1996, which made permanent the Chairman's revised Order of Temporary Closure, is not reported and is reproduced in the Appendix.

The District Court's Memorandum Opinion and Order denying the United States' Motion for Reconsideration, Motion to Alter or Amend Judgment, and Motion for Leave to File a Supplemental Pleading, dated December 31, 1996, is not reported and is reproduced in the Appendix.

The Eighth Circuit Court of Appeals' January 29, 1998 Opinion, which reversed the District Court's decision,

is reported at 135 F.3d 558, and is also reproduced in the Appendix.

The Eighth Circuit Court of Appeals' May 2, 1998 Order Denying Petitioner's Petition for Rehearing is not reported, and is reproduced in the Appendix.

The Eighth Circuit Court of Appeals' Order granting the Santee Sioux Tribe's Motion to Stay issuance of the mandate dated April 17, 1998, is not reported, and is reproduced in the Appendix.

## BASIS FOR JURISDICTION OF THE UNITED STATES SUPREME COURT

The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) in that this Petition seeks review of a judgment of the United States Court of Appeals for the Eighth Circuit, and is filed within ninety days of entry of said judgment.

The judgment sought to be reviewed, *United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th Cir. 1998), is dated January 29, 1998.

The Eighth Circuit's denial of the Santee Sioux Tribe's Petition for Rehearing is dated April 2, 1998.

## STATUTES INVOLVED

18 U.S.C. § 1166

25 U.S.C. § 2701

25 U.S.C. § 2703(6)

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Neb. Rev. Stat. § 28-1113 (1995)

*Copies of these statutes are set forth in the Appendix.*

## STATEMENT OF THE CASE

This case arose as the result of the Santee Sioux Tribe's ("Tribe" or "Petitioner") inability to enforce the provisions of the Indian Gaming Regulatory Act ("IGRA") to remedy the State of Nebraska's ("State") failure to negotiate in good faith for a tribal-state compact, as required by IGRA, 25 U.S.C. § 2710(d)(3). After unsuccessfully attempting to negotiate with the state for over three years, the Tribe in February, 1996, filed suit against the State pursuant to IGRA, 25 U.S.C. § 2710(d)(7). Concurrently, the Tribe began operating a small gaming facility offering electronic and electromechanical facsimiles of games of chance.

In March, 1996, this Court, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), held that Congress lacked

the constitutional authority to enact the remedial provisions of IGRA which permit an Indian tribe to sue a state in federal court for failing to negotiate in good faith for a tribal-state compact. In light of *Seminole Tribe*, the District Court dismissed the Tribe's suit against the State.[1]

In April, 1996, the Chairman of the National Indian Gaming Commission ("NIGC") issued a notice of violation and order of temporary closure, ordering the Tribe to close its gaming facility. The sole basis for the Chairman's order was the absence of a tribal-state compact authorizing gaming activities conducted by the Tribe. Thereafter, Tribe filed an action in the United States District Court for the District of Nebraska, alleging that IGRA cannot be interpreted in a manner that allows states to unilaterally prohibit tribes from exercising their statutory rights to operate Class III gaming by failing to negotiate a tribal-state compact. The Tribe prayed for an order declaring that, in light of this Court's decision in *Seminole Tribe*, the tribal-state compacting provisions of IGRA were unconstitutional and unenforceable. The Tribe also prayed for an order enjoining the NIGC and the United States Department of Justice from enforcing gaming laws against the Tribe pending the Secretary of the Interior's promulgation of procedures under which Class III gaming could be conducted by the Tribe in the absence of a tribal-state compact.[2]

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[1] This decision was affirmed on appeal. *Santee Sioux Tribe v. Nebraska*, 121 F.3d 427, 432 (8th Cir. 1997).

[2] *See*, Advance Notice of Proposed Rulemaking, 61 Fed. Reg. 21394 (May 10, 1996), *corrected at* 61 Fed. Reg. 25604 (May 22, 1996); *see also*, Proposed Rule, 63 Fed. Reg. 3289, *et seq.* (Jan. 22, 1998).

On July 2, 1996, the United States filed a complaint against the Tribe, praying for an order declaring that the Tribe's conduct of Class III gaming in the absence of a tribal-state compact violated IGRA and Nebraska law, enforcing the Chairman's temporary closure order, and enjoining the tribe from conducting Class III gaming without a tribal-state compact. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1345, and 18 U.S.C. § 1166(a). In its Answer, the Tribe denied that the gaming it was operating violated IGRA and Nebraska law, and raised affirmative defenses, including that IGRA's Class III gaming provisions were unconstitutional and unenforceable. Pursuant to agreement of the parties, the lawsuits were consolidated.

On July 10, 1996, the District Court dismissed the Tribe's case, holding that the Chairman's closure order was temporary, and not subject to judicial review. In an Amended Judgment dated July 12, 1996, the Court entered judgment in favor of the Tribe in the action brought by the United States, holding that the United States was not entitled to a civil injunction enforcing the temporary closure order, that the United States could not use a civil injunction to enforce putatively criminal activities, that the United States Attorney lacked authority to enforce orders of the NIGC, that there was no statutory authority for the requested injunctive relief, and that the United States had failed to establish that the Tribe's activities constituted a nuisance under Nebraska law, as applied to the Tribe via IGRA, 18 U.S.C. § 1166(a).

On July 31, 1996, the NIGC made the Chairman's temporary closure order final, again solely on the basis

that the Tribe lacked a tribal-state compact.[3] Subsequently, the United States filed a motion with the District Court to file a supplemental pleading, alleging the NIGC had issued a final order. On December 31, 1996, the District Court entered an order denying the United States' motion. The United States appealed to the Eighth Circuit Court of Appeals, invoking that Court's jurisdiction pursuant to 28 U.S.C. § 1291.

On appeal, the United States claimed that the District Court erred in refusing to enjoin the Tribe's putatively illegal gaming under Nebraska law as applied by 18 U.S.C. § 1166(a), and in refusing to enforce the Chairman's temporary closure order. The Tribe argued that the form of gaming operated by the Tribe was permitted for some purposes by some persons, organizations or entities under Nebraska law, and, as such, the gaming was not enjoinable as a nuisance under IGRA, 18 U.S.C. § 1166(a). The Tribe asserted that Congress intended that the Tribe have a right to operate such gaming under 25 U.S.C. § 2710(d)(1)(B). The Tribe further asserted that, in light of this Court's decision in *Seminole Tribe*, the tribal-state compact requirement and enforcement provisions of IGRA were no longer valid, and could not be enforced against the Tribe.

On January 29, 1998, the Court of Appeals rendered its opinion reversing the District Court's decision. *United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th

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[3] The NIGC noted that the evidence before the Commission "tend[ed] to suggest that the Governor [of Nebraska] did not negotiate in good faith." *In the Matter of Santee Sioux Tribe of Nebraska*, Ref. Nos. NOV-96-01, CO-96-01, at 14, Nat'l Indian Gaming Comm'n (July 31, 1996).

Cir. 1998). The Court held that the United States Attorney had authority to enforce the NIGC closure orders, and that the United States was entitled to injunctive relief under Nebraska law as assimilated by IGRA, 18 U.S.C. § 1166(a). *Id.* at 561-65.

The Court rejected the Tribe's argument that the gaming operated by the tribe was permitted under Nebraska law, and declined to address the Tribe's claim that IGRA's compacting provisions are no longer valid in light of the finding of unconstitutionality in *Seminole Tribe*. The Court of Appeals further held that the State was not required by IGRA to negotiate over the forms of gaming that the Tribe was operating.[4] *Id.* at 565-66.

On March 12, 1998, the Tribe filed a motion for rehearing with suggestion for rehearing *en banc*, asserting that the Court of Appeals' conclusion – that the state was not obligated to negotiate over the forms of gaming operated by the Tribe – was based upon an erroneously restrictive interpretation of the scope of gaming subject to negotiation under IGRA, 25 U.S.C. § 2710(d)(1)(B), and upon an erroneous partial quotation of Nebraska statutes. On April 2, 1998, the Court of Appeals denied the Tribe's motion for rehearing and suggestion for rehearing *en banc*. Subsequently, the Court of Appeals granted the Tribe's Motion to Stay the issuance of a mandate pending the Tribe's filing of a Petition for Certiorari with this Court.

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[4] The District Court did not decide the issue of whether the State was required to negotiate over the forms of gaming operated by the Tribe.

## REASONS FOR ALLOWANCE OF THE WRIT

### I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ON AN ISSUE ESSENTIAL TO THE OPERATION OF THE INDIAN GAMING REGULATORY ACT

This Court, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), held that a state could not enforce its gaming laws on Indian lands if such laws were "civil/regulatory" as opposed to "criminal/prohibitory" in nature. In response to *Cabazon*, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, with the primary purpose of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." *Id.*, § 2701(1). Consistent with *Cabazon*, IGRA expressly provides:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

*Id.*, § 2701(5).

IGRA divides gaming into three categories. Class III gaming, the form of gaming at issue in this Petition, includes casino gaming, including electronic and electro-mechanical facsimiles of games of chance. 25 U.S.C. § 2703(6) - (8). Under IGRA, Class III gaming activities are lawful on Indian lands only if such activities are (1)

authorized by an ordinance that is adopted by the governing body of the Tribe and approved by the Chairman of the National Indian Gaming Commission; (2) "located in a state that permits such gaming for any purpose by any person, organization, or entity;" and (3) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. 25 U.S.C. § 2710(d)(1). This Petition, in part, concerns the proper interpretation of the second of these requirements, the scope of gaming that is subject to negotiation between a tribe and a state pursuant to IGRA, § 2710(d)(1)(B).

The scope of gaming issue has been a fertile source of litigation between tribes, states and the United States since IGRA's enactment.[5] The scope of gaming litigation has resulted in no less than four conflicting United States

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[5] *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *United States v. Spokane Tribe of Indians*, ___ F.3d ___, 1998 WL 136213 (9th Cir. March 27, 1998); *Coeur D'Alene Tribe v. Idaho*, 51 F.3d 876 (9th Cir.), *cert. den.*, 116 S.Ct. 305 (1995); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994), *cert. denied sub. nom. Sycuan Band of Mission Indians v. Wilson*, 117 S.Ct. 2508 (1997); *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994), *vacated*, 116 S.Ct. 1410 (1996); *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. den.*, 514 U.S. 1016 (1995); *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green*, 995 F.2d 179 (10th Cir. 1993); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990), *cert. den.*, 499 U.S. 975 (1991); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D. Ariz. 1992); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992).

Courts of Appeals' interpretations of IGRA's scope of gaming provisions, and has resulted in unresolved conflicts among different panels of the Eighth Circuit Court of Appeals.[6] This Court has denied petitions for certiorari in at least two cases that have sought to resolve the scope of gaming issue.[7] The result has been that the scope of gaming issue remains unresolved, and tribes located in one federal judicial circuit are forced to comply with a different version of IGRA than tribes located in other circuits.

The crux of the scope of gaming issue is whether, in enacting the tribal-state compacting provisions of IGRA, § 2710(d)(1)(B), Congress incorporated the entire corpus of state law, including state regulation of a permitted form of gaming, or whether, and to what extent, states must negotiate with tribes over terms and conditions of permitted forms of gaming.

In the present case, the United States Court of Appeals for the Eighth Circuit interpreted IGRA's scope of gaming provision to incorporate the entire corpus of Nebraska gaming laws and regulations. The Court of Appeals equated the scope of gaming subject to negotiation pursuant to 25 U.S.C. § 2710(d)(1)(B) with the assimilation of all state gaming laws and regulations applicable in the absence of a tribal-state compact, pursuant to 18 U.S.C. § 1166(a). *United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 564 (8th Cir. 1998). The Court concluded that the State of Nebraska is not required to negotiate over electronic and electromechanical facsimiles

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[6] *See infra*, pp. 10-18.

[7] *See Sycuan Band of Mission Indians v. Wilson*, 117 S.Ct. 2508 (1997); *Connecticut v. Mashantucket Pequot Tribe*, 499 U.S. 975 (1991).

of games of chance, even though under Nebraska statutes, persons, entities and organizations are permitted to operate some forms of "player-activated electronic and electromechanical facsimiles of games of chance" for business promotion purposes.[8] *See, id.* at 564-66.

In *Santee Sioux Tribe*, the Court of Appeals relied on its prior decision in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). In *Cheyenne River*, the Court, with little explanation, held that the State of South Dakota was not obligated to negotiate with the Tribe over traditional keno, even though the state permitted video keno, stating:

> The "such gaming" language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit. Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal . . . for the tribe to offer traditional keno to its patrons.

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[8] Although the Court held that the games operated by the Tribe were "prohibited" by Nebraska law, it is clear from the face of several Nebraska statutes (the relevant portions of which were omitted in the Court's opinion) that the State permits the operation of player-activated electronic and electromechanical facsimiles of games of chance, subject to regulation. Neb. Rev. Stat. § 9-701(1) permits the operation of "game[s] of chance" for purposes of a business promotion, including the operation of telecommunications-related, player-activated, electronic and electromechanical facsimiles of games of chance. Furthermore, Nebraska criminal statutes expressly exempt the operation of gambling devices pursuant to § 9-701 from criminal prohibition. Neb. Rev. Stat. §§ 28-1101(5); 28-1113(2). The Eighth Circuit's Opinion erroneously quotes only portions of the statutes, thus making the regulatory-permissive nature of these statutes appear prohibitory.

*Id.*, 3 F.3d at 279. The Court in *Cheyenne River* further interpreted § 2710(d)(1)(B) to incorporate the entire corpus of state regulatory gaming laws, holding that the state was not obligated to negotiate with the tribe over maximum bet limits, stating:

> We agree with the state that it need not negotiate regarding bet limits because bet limits are established by state law. The state is not obligated to allow the tribe to operate under bet limits higher than the state statutory limit of $5.

*Id.*[9] The decisions in the present case and in *Cheyenne River* demonstrate that the Eighth Circuit has restrictively interpreted IGRA, 25 U.S.C. § 2710(d)(1)(B), to require that a state's entire gaming regulatory scheme be imposed on tribal lands, and that it would be "illegal" for the state to negotiate terms and conditions of a permitted form of gaming that are different than the terms and conditions permitted under state law.

In stark contrast to *Santee Sioux* and *Cheyenne River*, the Second Circuit Court of Appeals has expressly rejected the argument that section 2710(d)(1)(B) incorporates all state gaming laws and regulations. In *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1026 (2nd Cir. 1990), the state had refused to negotiate with the Tribe over Class III games of chance permitted by Connecticut law for certain nonprofit organizations at "Las

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[9] The Senate Report accompanying IGRA expressly states that terms and conditions such as "wage and pot limits" and "types of wagers" are to be the subject of tribal-state compact negotiations. S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084.

Vegas nights."[10] The state argued that the Tribe was required to comply with all rules and regulations contained in Connecticut statutes regarding the operation of permitted forms of gaming. The Second Circuit rejected the state's argument, holding that the scope of Class III gaming subject to negotiation is to be determined by the *Cabazon* public policy test. The Court of Appeals reached this conclusion after a meticulous analysis of the plain language and legislative history of IGRA. Significantly, the Court of Appeals stated:

> Under the State's approach, on the contrary, even where a state does not prohibit Class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as the centerpiece of the IGRA's regulation of Class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

*Id.* 913 F.2d at 1030-31 (footnote omitted).

A third approach to the scope of Class III gaming issue has been adopted by the Ninth Circuit Court of Appeals. In *Rumsey Indian Rancheria of Wintun Indians v.*

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[10] Connecticut laws strictly limited the gaming operated at Las Vegas Nights to certain nonprofit organizations, and also limited the size and type of wagers, the character of the prizes, and the frequency of operations. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

*Wilson*, 41 F.3d 421, 428 n.4 (9th Cir. 1994), the Court disagreed with that portion of the Second Circuit Court of Appeals' decision in *Mashantucket Pequot*, wherein the Second Circuit held that the scope of gaming subject to negotiation is to be determined by the *Cabazon* test. Rather, the Ninth Circuit agreed with part of the Eighth Circuit Court of Appeals' decision in *Cheyenne River*, finding that the plain language of IGRA, 25 U.S.C. § 2710(d)(1)(B), dictates that:

> IGRA does not require a state to negotiate over one form of gaming activity simply because it has legalized another, albeit similar, form of gaming. Instead, the statute only says that, if a state allows a particular gaming activity, "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.

*Rumsey*, 41 F.3d at 427.[11] However, *Rumsey* conflicts with the Eighth Circuit's holding that a State need not negotiate over terms and conditions of a permitted form of gaming, such as wager limits, because the Court of Appeals in *Rumsey* acknowledged that the Second Circuit

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[11] Six Ninth Circuit Judges disagreed with the *Rumsey* panel, and stated that both the Eighth and Ninth Circuits' interpretation of section 2710(d)(1)(B) was overly restrictive. These six Judges dissented from the denial of a rehearing *en banc* on this issue. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1252-55 (9th Cir. 1995) (Casey, J., dissenting from denial of rehearing *en banc*).

had "reached the correct result" in *Mashantucket Pequot*. *Id.*, 41 F.3d at 428, n.4.

The Ninth Circuit Court of Appeals' decision in *Rumsey* thus stands for the proposition that once a state permits a form of gaming for any purpose by any person, organization or entity, section 2710(d)(1)(B) does not require a tribe to comply with a state's entire regulatory scheme for that form of gaming. In other words, the state is required to negotiate over terms and conditions of a permitted form of gaming, such as the size and type of wagers and prizes, hours of operation, and other regulatory terms and conditions regarding the operation of otherwise permitted forms of the gaming.

Yet a fourth interpretation of the scope of Class III gaming permitted under IGRA was announced by the Tenth Circuit Court of Appeals in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green*, 995 F.2d 179 (10th Cir. 1993). In *Citizen Band*, the Court of Appeals held that Video Lottery Terminals would be the proper subject of compact negotiations if the state otherwise made legal the operation of "gambling devices," as that term is broadly defined in the federal Johnson Act, 15 U.S.C. § 1171. The court held:

> Congress must have meant that gambling devices be legal absent the Tribal-State compact; otherwise it would not have been necessary to require that both the gambling devices be legal, 25 U.S.C. § 2710(d)(6)(A), and that the compact be "in effect," *id.* § 2710(d)(6)(B).

*Id.*, at 181. Accordingly, under the *Citizen Band* approach, if a state permits a broad category of Class III games (i.e., "gambling devices,") the state is required to negotiate

over all games that fall within that category (e.g., "video lottery terminals"), regardless of the terms or conditions of the play of such games imposed by state law.

The disparity of interpretations of the scope of gaming permitted under IGRA even exists between panels of the Eighth Circuit Court of Appeals.[12] As noted above, in *Santee Sioux* and *Cheyenne River*, the Court of Appeals applied a restrictive interpretation of IGRA's scope of gaming provision, essentially holding that a state need not negotiate anything beyond the very letter of state gaming laws and regulations. However, in two other cases, the Eighth Circuit held differently. In *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990), the United States sought to enjoin the tribe from increasing the number of blackjack tables, the size of wagers, and the hours of operation at the tribe's casino, arguing that, in enacting IGRA, "Congress has simply assimilated state law." *Id.*, 897 F.2d at 358. The Court of Appeals rejected this argument. Relying on IGRA's legislative history, the court held that IGRA incorporated the *Cabazon* distinction between regulation and prohibition in determining the forms of gaming that may be conducted on Indian lands, stating:

> Contrary to the district court's holding, we believe that the legislative history reveals that Congress intended to permit a particular gaming activity, *even if conducted in a manner inconsistent with state law*, if the state law merely

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[12] There are also at least six Judges in the Ninth Circuit Court of Appeals that disagree with the scope of gaming position taken by the Ninth Circuit panel in *Rumsey*. *See supra*, note 11.

> regulated, as opposed to completely barred, that particular gaming activity.

*Id.*, 897 F.2d at 365 (emphasis supplied) (footnote omitted).

More recently, the Eighth Circuit reaffirmed that Congress incorporated the *Cabazon* distinction between prohibition and regulation in determining the scope of gaming subject to negotiation in a tribal-state compact governing Class III gaming. In *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546-547 (8th Cir. 1996), the court held:

> Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes. They are a creation of federal law, and IGRA prescribes, "the permissible scope of a Tribal-State compact, see § 2710(d)(3)(C)."
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> * * *
>
> A relevant factor to consider regarding the intent of Congress is the effect of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), on the final form of IGRA.
>
> * * *
>
> *IGRA incorporated Cabazon's distinction between prohibition and regulation; see United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990). . . .
>
> * * *
>
> *If a State law seeks to regulate gaming, it will not be applied. If a state law prohibits a class of gaming, it may have force.*

*Id.* 88 F. 3d at 547 (emphasis supplied) (citations omitted).

The above demonstrates that the various appellate court interpretations of the scope of gaming subject to negotiation pursuant to § 2710(d)(1)(B) cover the entire spectrum of possibilities, from the literal assimilation of all state regulatory terms, to the requirement that a state negotiate over any and all terms and conditions of a non-prohibited form of gaming. The conflicting interpretations will remain unresolved unless and until this Court addresses this issue on the merits.

## II. RESOLUTION OF THE SCOPE OF GAMING ISSUE IS VITAL TO THE ECONOMIC SURVIVAL OF HUNDREDS OF INDIAN TRIBES LOCATED THROUGHOUT THE COUNTRY

There are currently over 188 Indian tribes that depend on gaming as a source of revenue.[13] For many of these tribes, Class III gaming is the primary source of tribal revenues.[14] Nonetheless, numerous of these and other tribes have been unable to obtain a Class III gaming compact, primarily due to unresolved disputes with states over the scope of gaming subject to negotiation pursuant to 25 U.S.C. § 2710(d)(1)(B).

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[13] National Indian Gaming Commission, *Report to the Secretary of the Interior on Compliance with the Indian Gaming Regulatory Act* (August, 1997).

[14] IGRA requires that tribal gaming revenues be used for the purposes of funding tribal government operations, to promote tribal economic development, to provide for the general welfare of the tribe and its members, and similar tribal government purposes. 25 U.S.C. § 2710(b)(2)(B).

Without a uniform interpretation of section 2710(d)(1)(B), both tribes and states have federal judicial precedent to support their respective interpretation of the scope of gaming permitted under IGRA. When coupled with the absence of a remedial mechanism to resolve these disputes, many Tribes are denied the ability to obtain a Class III gaming compact, and as a result, are prevented from furthering the federal goals of tribal self-sufficiency and self-determination.[15]

Even if a mechanism is put in place to resolve these disputes, without a uniform interpretation of section 2710(d)(1)(B), there promises to be years of litigation before many of these disputes are finally resolved. For example, on January 22, 1998, the Department of the Interior published proposed rules that, if finalized, will enable the Secretary of the Interior to prescribe procedures under which a tribe may operate Class III gaming where the state has raised its Eleventh Amendment immunity to suit in an action brought by a tribe pursuant to 25 U.S.C. § 2710(d)(7). Proposed Rule, 63 Fed. Reg. 3289, *et seq.*, (Jan. 29, 1998). In the supplementary information published with the proposed rule, the Department states:

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[15] Petitioner also notes that numerous existing tribal-state compacts in several states will expire over the next few years, which will undoubtedly spur a new round of negotiations over the scope of gaming. In light of the decision in *Seminole Tribe*, there is nothing to prevent states from taking an unreasonably restrictive position on the scope of gaming, and no remedy available to tribes if the states choose to negotiate in bad faith, or not to negotiate at all.

> In evaluating the permissible "scope of gaming" under various state laws, the Department will apply the interpretation set forth as the position of the United States on the scope of gaming in its *amicus curiae* brief in the Supreme Court in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 63 F.3d 1250 (9th Cir. 1995), *as modified on denial of petition for rehearing*, 99 F.3d 321 (9th Cir. 1996), *cert. denied, sub. nom. Sycuan Band of Mission Indians v. Wilson*, No. 96-1059, 65 U.S.L.W. 3855 (June 24, 1997).

*Id.* 63 Fed. Reg. at 3292-93. Petitioner submits that the position of the United States on the scope of gaming, referenced by the Department of the Interior, conflicts with the interpretation of no less than three United States Courts of Appeals on this issue.[16] Furthermore, upon the publication of the above proposed rules, the National Governors' Association and several states, including the State of Nebraska, announced their intent to initiate litigation to prevent the implementation of any final rule that is promulgated. Accordingly, unless and until a uniform, nationwide standard for the scope of gaming is pronounced, this issue will remain unresolved.

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[16] *Compare*, Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, 13-18, *Sycuan Band of Indians v. Wilson*, No. 96-1059, 65 U.S.L.W. 3855 (June 24, 1997), *cert. denied*, 117 S.Ct. 2508 (1997), *with Cheyenne River, supra; Santee Sioux Tribe, supra; Citizen Band, supra;* and *Mashantucket Pequot, supra.*

## III. THE ISSUE OF WHETHER THE CLASS III GAMING PROVISIONS OF IGRA ARE VALID IN LIGHT OF THIS COURT'S DECISION IN *SEMINOLE TRIBE* IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In *Seminole Tribe*, this Court held that Congress did not have the authority to abrogate states' Eleventh Amendment immunity from suits brought pursuant to IGRA, 25 U.S.C. § 2710(d)(7). However, after ruling § 2710(d)(7) unconstitutional, this Court did not conduct an analysis to determine which portions of IGRA, if any, remain valid.

In *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), this Court held, "Whenever an Act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, *it is the duty of this Court to so declare* and to maintain the Act insofar as it is valid." (emphasis supplied) (citation omitted). This Court further held:

> The standard for determining the severability of an unconstitutional provision is well-established: "unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."
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> . . .
>
> The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress. . . . The final test . . . is the traditional one: the

> unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

*Alaska Airlines*, 480 U.S. at 684-86 (citations omitted).

In accordance with the principles set forth in *Alaska Airlines, supra*, this Court must determine whether IGRA, or some portion thereof, can function independently of § 2710(d)(7).

This issue was recently addressed by the Ninth Circuit Court of Appeals in *United States v. Spokane Tribe of Indians*, ___ F.3d ___, ___, 1998 WL 136213 (9th Cir. March 27, 1998). In *Spokane Tribe*, as in the present case, the United States sought to enjoin non-compacted Class III tribal gaming pursuant to 18 U.S.C. § 1166(a). The Court of Appeals held that § 1166 cannot be utilized to enjoin non-compacted tribal gaming where the state has raised its Eleventh Amendment immunity in a suit brought by a tribe pursuant to IGRA, § 2710(d)(7). The Court stated:

> The question we must ask is this: Would Congress have enacted IGRA had it known that it could not give tribes the right to sue states that refuse to negotiate? If the answer is "Yes", then the rest of IGRA remains valid. If the answer is "No", things become more complicated, as we must then ask which other provisions of IGRA are called into question, and under what circumstances.
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> . . .
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> . . . It is quite clear from the structure of the statute that the tribe's right to sue the state is the key part of a carefully-crafted scheme balancing the interests of the tribes and the

> states. It therefore seems highly unlikely that Congress would have passed one part without the other, leaving the tribes essentially powerless.
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> . . .
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> IGRA as passed thus struck a finely tuned balance between the interest of the states and the tribes. Most likely it would not have been enacted if that balance had tipped conclusively in favor of the states, and without IGRA the states would have no say whatever over Indian gaming.
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> . . .
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> . . . We are left, then, with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that allegedly hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now. Under these circumstances, IGRA's provisions governing Class III gaming may not be enforced against the tribe.

*Id.*, ___ F.3d at ___, 1998 WL 136213 at *2-5 (citations omitted).

Unlike the Ninth Circuit Court of Appeals, the Eighth Circuit Court of Appeals, in the present case, declined to address the Tribe's affirmative defense that, after *Seminole Tribe*, the Class III compacting provisions of IGRA are void, or, at a minimum, such provisions cannot be enforced against the Tribe. Instead, the Eighth Circuit Court of Appeals held:

> The Tribe argues that because of the Supreme Court's determination in *Seminole Tribe* that

> Congress was not empowered to authorize lawsuits by Indian tribes against states that fail to negotiate in good faith for a tribal-state compact, all provisions of the IGRA related to compacting are unconstitutional. We decline to address this argument given our conclusion that, under the IGRA, the State is not required to negotiate for gambling that is illegal under Nebraska law.

*Santee Sioux Tribe*, 135 F.3d at 565 (citations omitted).

The Tribe submits that the Court of Appeals' reason for not addressing the Tribe's argument is circular. If the Class III compacting provisions of IGRA are stricken, then there would be no requirement that the state or the tribe negotiate – there would be no compacting requirement in IGRA at all. The Tribe further submits that, as was the case in *Spokane Tribe*, a severance of IGRA would also render 18 U.S.C. § 1166 unenforceable, for Congress did not intend to merely assimilate state regulatory gaming laws into federal law in the absence of the availability of a Class III gaming compact.[17] Finally, if the Class III provisions are stricken or declared unenforceable (as was done in *Spokane Tribe*), the sole basis for the underlying administrative order of closure disappears, because the sole basis for that order was the absence of a tribal-state compact.

In sum, the Santee Sioux Tribe was entitled to have its constitutional severance issues addressed on the

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[17] In states like Nebraska, where the state has asserted sovereign immunity to suits brought by tribes seeking to compel the state to honor its duty to negotiate in good faith, a Class III compact is, in fact, unavailable.

merits by the Eighth Circuit Court of Appeals. The Court of Appeals' avoidance of this issue on the grounds that the State of Nebraska is not required to negotiate over certain Class III games simply begs the question.

## CONCLUSION

It has been nearly ten years since Congress enacted IGRA with the express goals of furthering tribal economic development, self-sufficiency, and strong tribal governments. However, the lack of a uniform interpretation of IGRA's scope of gaming provision has resulted in often bitter disputes between tribes and states over the types of gaming that are appropriate for inclusion in a tribal-state compact. This problem was compounded when the only available mechanism for resolving these disputes was held unconstitutional by this Court in 1996. Ironically, today many tribes, including Petitioner, are no closer to attaining the congressional goals set forth in IGRA than they were in 1988.

Accordingly, Petitioner respectfully requests that this Court grant Petitioner's Petition for Writ of Certiorari for consideration of the questions presented for review herein.

DATED this 13th day of May, 1998.

Respectfully submitted,

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**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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No. 97-1546

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| United States of America, Appellant, | * | |
| v. | * | Appeal from the United States District Court for the District of Nebraska. |
| Santee Sioux Tribe of Nebraska, a Federally Recognized Indian Tribe, Appellee. | * | |

Submitted: November 19, 1997
Filed: January 29, 1998

Before BOWMAN, BRIGHT, and MURPHY, Circuit Judges.

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BOWMAN, Circuit Judge.

The United States appeals the judgment of the District Court denying the government's request for an injunction and refusing to enforce the temporary closure order of the Chairman of the National Indian Gaming Commission ("NIGC" or "Commission") to prevent the Santee Sioux Tribe of Nebraska ("the Tribe") from operating a gambling casino on the Tribe's reservation. We reverse.

I.

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), Pub.L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (1994); 18 U.S.C. §§ 1166-1168 (1994)), which authorizes class III gaming activities on Indian lands[1] provided that such activities are permitted under a tribal "ordinance or resolution," "located in a State that permits such gaming for any purpose by any person, organization, or entity," and "conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1).

In March 1993, the Tribe approached the State of Nebraska to engage in tribal-state compact negotiations necessary under the IGRA to conduct class III gaming on the Tribe's lands. After failing to reach an agreement with the State despite extended negotiations, the Tribe opened a class III gaming facility on tribal lands in February 1996. This casino offered tribal members and the general public the opportunity to play video slot machines, video poker machines, and video blackjack machines. In the same

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[1] At all times relevant to this litigation, the IGRA defined class I gaming as "social games . . . for prizes of minimal value or traditional forms of . . . gaming" in connection with tribal ceremonies, 25 U.S.C. § 2703(6); *see also* 25 C.F.R. § 502.2 (1997), class II gaming as "the game of chance commonly known as bingo . . . including . . . pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo" and certain card games, 25 U.S.C. § 2703(7)(A); *see also* 25 C.F.R. § 502.3 (1997), and class III gaming as "all forms of gaming that are not class I gaming or class II gaming," 25 U.S.C. § 2703(8) (including "slot machines . . . and electromechanical facsimiles of any game of chance"); 25 C.F.R. § 502.4 (1997).

month, the Tribe filed suit against the State of Nebraska and its Governor in district court alleging failure to negotiate in good faith for a tribal-state compact. *See id.* § 2710(d)(3) (negotiation of compact), (7) (jurisdiction of federal courts). The State asserted that the Tribe's lawsuit was barred by the Eleventh Amendment and counterclaimed, alleging that the Tribe was conducting class III gaming in violation of the IGRA. The State requested declaratory and injunctive relief as well as a temporary restraining order to enjoin the Tribe's gaming activities. The District Court denied the State's motion for a temporary restraining order, holding that the State could not use a civil injunction to enjoin purportedly illegal activity, and that the State had failed to establish that the Tribe's gaming activity constituted a public nuisance suitable for injunctive relief.

On March 27, 1996, the United States Supreme Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), wherein the Court held that Congress lacked the authority to enact the remedial sections of the IGRA allowing an Indian tribe to sue a state, and that these sections comprised an unconstitutional abrogation of the states' sovereign immunity. In light of this decision, the District Court dismissed the Tribe's suit against the State of Nebraska and denied the Tribe's motion for a new trial.[2]

On April 25, 1996, the Chairman of the NIGC entered a notice of violation, *see* 25 C.F.R. § 573.3 (1996), and an order of temporary closure, *see* 25 U.S.C. §§ 2705(a)(1),

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[2] On appeal, we affirmed the District Court's dismissal of the Tribe's action against the State. *See Santee Sioux Tribe v. Nebraska*, 121 F.3d 427, 432 (8th Cir.1997).

2713(b); 25 C.F.R. § 573.6(11) (1996), informing the Tribe that, in the absence of a tribal-state compact, its class III gaming activities were being conducted in violation of the IGRA, and demanding that the Tribe close its gaming facility on or before May 3, 1996. The Tribe requested and was granted expedited review before the Chairman, who declined to amend his original conclusions regarding the violations but issued a revised order extending the date for closure to May 5, 1996. The Tribe closed its gaming facility on May 5, 1996, in compliance with this order, but filed an appeal of the Chairman's order with the full Commission and with the District Court. In the District Court, the Tribe prayed for an order declaring that the tribal-state compacting provisions of the IGRA were unconstitutional and that the State permits class III gaming; and for an order enjoining the NIGC and the United States Department of Justice from enforcing gaming laws against the Tribe. On June 28, 1996, the Tribe reopened its gaming facility, which it has continued to operate during the pendency of this lawsuit.

On July 2, 1996, the United States filed a complaint against the Tribe seeking orders declaring that the Tribe's conduct of class III gaming violates federal and state law, enforcing the Chairman's closure order, and enjoining the Tribe from conducting class III gaming without a valid tribal-state compact. These lawsuits were consolidated with the agreement of the two parties.

The District Court dismissed the Tribe's case on July 7, 1996, holding that the Chairman's temporary closure order was not final agency action subject to judicial review. The court likewise dismissed the government's case, holding that the United States was not entitled to a

civil injunction enforcing the Chairman's order (which, although temporary, was still in effect) because the IGRA vested authority to enforce such orders with the NIGC and its Chairman. The court also held that civil injunctive relief could not be employed to enjoin the Tribe's purportedly illegal activities. Finally, the court held that there was no statute granting the court authority to enjoin the Tribe's gaming activities and that these activities had not been established as a nuisance subjecting them to injunction under state law.

On July 31, 1996, the NIGC upheld on appeal the Chairman's order of temporary closure, whereupon that order became final. Subsequently, on August 7, 1996, the United States filed a motion with the District Court seeking leave to file a supplemental pleading given that the NIGC had issued its final order. On December 31, 1996, the District Court denied the government's motion and suggested that the United States was empowered only to pursue criminal prosecution under the IGRA and that the NIGC had "neither authorized nor directed the United States Attorney to attempt to enforce the Commission's order by seeking a civil injunction." Memorandum Opinion & Order at 6 (Dec. 31, 1996).

The United States appeals the decision of the District Court refusing to enjoin the Tribe's gaming activities and declining to enforce against the Tribe the closure order of the Chairman of the NIGC.

## II.

We initially must determine whether the United States, acting through the Attorney General and her

United States Attorneys, is entitled to maintain this action to enforce the closure order issued by the NIGC. The government contends that the broad grant of authority to litigate given to the Attorney General and her United States Attorneys under 28 U.S.C. § 516 (1994) encompasses an action to enforce the NIGC's closure order intended to prevent the Tribe's illegal gaming activity. Section 516 provides, "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." The Tribe, on the other hand, contends that the Attorney General has no authority under § 516 to enforce closure orders issued by the NIGC or its Chairman. We hold that the Attorney General is empowered under § 516 to seek enforcement of the closure orders of the NIGC.

The IGRA authorizes the Chairman of the NIGC to issue temporary closure orders as well as to assess civil fines for violations of the Act, the NIGC regulations, or tribal ordinances, *see* 25 U.S.C. §§ 2705(a)(1), 2713(a)(1), 2713(b)(1), and provides for appeal of the Chairman's decisions to the full Commission, which may dissolve or make permanent the Chairman's orders, *see id.* §§ 2706(a)(5), 2713(b)(2). The NIGC's final orders are then appealable to the district court. *See id.* § 2713(c). Neither the IGRA nor its accompanying regulations grants specifically to the NIGC or its Chairman independent authority to litigate the agency's decisions. Nor does the IGRA address specifically the Attorney General's authority to institute judicial proceedings on behalf of the Chairman

or the NIGC to enforce closure orders or assessments of civil fines.

Because the IGRA is silent with respect to the authority to conduct litigation necessary to enforce the NIGC's closure orders in the event those orders are ignored or its assessments are left unpaid by Indian Tribes engaging in gaming activities in violation of the Act, we must assume that Congress intended for the Attorney General to conduct this enforcement function on behalf of the agency.[3] "Pursuant to 28 U.S.C. § 516, the Attorney General has exclusive authority and plenary power to control the conduct of litigation in which the United States is involved, unless Congress specially authorizes an agency to proceed without the supervision of the Attorney General." *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992) (construing Attorney General's authority under CERCLA to enter cost recovery settlement). Furthermore, the Attorney General may file suit on behalf of the United States without specific statutory authority whenever the United States has a justiciable interest. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960) ("The test [is] whether the United States [has] an interest to protect or

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[3] We note that the United States Attorney appeared before the District Court and announced his representation of the United States and all other named defendants in this action without complaint from the Tribe. Furthermore, the District Court noted in its Findings of Fact and Conclusions of Law at 2 (July 10, 1996) that although the Tribe's complaint did not name the United States as a defendant and was filed only against the named defendants including the NIGC, it was "actually a suit against the United States as defendant." Again, the Tribe was not heard to complain of the court's conclusion.

defend."). "[T]he statutory authority of the Attorney General to control litigation is not diminished without a clear and unambiguous directive from Congress." *Hercules*, 961 F.2d at 798; *see also Federal Trade Comm'n v. Guignon*, 390 F.2d 323, 324 (8th Cir. 1968) (noting that agencies can conduct their own litigation only when granted "specific authorization to proceed without the advice, assistance or supervision of the Attorney General").

We cannot imagine that Congress intended to vest in the Chairman and the NIGC the power to assess fines against the tribal operators of the facilities and to order temporary closures of Indian gaming facilities operating in violation of the IGRA without providing for a means to ensure compliance with those decisions. The IGRA's silence on the matter of enforcement of the Chairman's closure orders compels our conclusion that the broad authority to litigate granted to the Attorney General under 28 U.S.C. § 516 envisions the action taken here by the United States Attorney to enforce, on behalf of the NIGC and the United States as an interested party, the Chairman's order demanding that the Tribe close its gaming facility.

## III.

Because we conclude that the United States has the authority to pursue this litigation, we must next address the government's contention that the District Court improperly refused to enforce the Chairman's closure order. We review the District Court's analysis of federal statutory law de novo. *See Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1280 (8th Cir. 1996). The Chairman's

closure order was based on the absence of a compact between the Tribe and the State of Nebraska permitting the conduct of class III gaming on the Tribe's lands, as required under the IGRA. It is undisputed before this Court that the video slot, poker, and blackjack machines being operated by the Tribe constitute class III gaming devices as defined under the IGRA. Likewise, it is undisputed that the Tribe and the State of Nebraska have not entered into a tribal-state compact to allow class III gaming on the Tribe's lands. The District Court concluded, however, that, "[a]lthough it would appear that the Chairman's closure order does remain in effect notwithstanding the Tribe's appeal of that order to the Commission, I find that the United States is not entitled to civil injunctive relief enforcing that order." Findings of Fact and Conclusions of Law at 9-10 (July 10, 1996). The District Court reasoned that any civil remedy available under the IGRA for violations of the Chairman's closure order was limited to the imposition of fines by the Chairman under 25 U.S.C. § 2713(a), and that the government was empowered under the IGRA to seek only criminal prosecution of violations of the Chairman's orders. We conclude, however, that under 25 U.S.C. § 2713(a), the Chairman is authorized to assess fines for violations of the IGRA itself, not for violations of closure orders entered under the auspices of the IGRA, and that the United States may pursue injunctive relief to ensure the Tribe's compliance with the Chairman's closure order.

Section 2713 of the IGRA, entitled "Civil penalties," grants the Chairman the power to either levy and collect fines for "any violation" of any tribal regulation, any provision of the IGRA, or any regulation prescribed by

the NIGC, 25 U.S.C. § 2713(a), or to issue orders of temporary closure for "substantial violation" of tribal regulations, any provision of the IGRA, or any NIGC regulation, 25 U.S.C. § 2713(b). In the Commission's regulations, temporary closure orders are included in the section entitled "enforcement," 25 C.F.R. pt. 573 (1996) (covering notices of violation and orders of temporary closure), while civil fines are in a separate self-titled section, *see id.* pt. 575 (1996) (covering how and when civil fines will be assessed, as well as settlements, reductions, waivers, and final assessments). Section 575.4 of the NIGC regulations addresses when civil fines will be assessed and does not include the imposition of fines for non-compliance with the Chairman's closure orders.

The text of the statute distinguishing between the options available to the Chairman for violations of the Act and its accompanying regulations, as well as the regulations themselves classifying closure orders as an enforcement mechanism distinct from the assessment of civil fines, indicates that the Chairman's authority to levy fines was not intended as a means of enforcing closure orders. We conclude that the District Court erred in refusing to enforce the Chairman's closure order on this basis.

## IV.

The United States next argues that, because it was entitled to pursue this litigation on behalf of the Chairman and the NIGC to stop the Tribe's illegal activity and because the assessment of civil fines is not an option available under the IGRA to ensure compliance with the Chairman's closure orders, the District Court erred in

refusing to issue an injunction enjoining the Tribe from the further conduct of class III gaming. "[I]njunctive relief should not be considered unless the record shows 'a real threat of [a] future violation [of the law] or a contemporary violation of a nature likely to continue or recur.' " *Webb v. Missouri Pac. R.R.*, 98 F.3d 1067, 1068 (8th Cir. 1996) (quoting *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) (internal quotation alterations in *Webb*)). Because the Tribe's gaming activities constitute a continuing violation of Nebraska law made applicable in Indian country through the IGRA, we conclude that the District Court erred in refusing to issue an injunction – a remedy available under Nebraska law. *See infra* Part IV.B.

A.

The Tribe's gaming activities violate the IGRA because they are being conducted in contravention of Nebraska law. Under the IGRA, an Indian tribe may engage in a gaming activity on tribal lands only if that specific gaming activity is permitted under the laws of the State where the tribal land is located. *See* 25 U.S.C. § 2710(d)(1)(B).[4] The IGRA also provides that "for purposes of Federal law, *all State laws* pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions . . . shall apply in

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[4] Section 2710(d)(1) of Title 25 of the United States Code provides that class III gaming shall be permissible on Indian lands only if the activities are authorized by a tribal ordinance or resolution; "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and "conducted in conformance with a Tribal-State compact."

Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a) (emphasis added).

It is undisputed that the Tribe is operating video poker, blackjack, and slot machines in its gaming facility. These forms of gambling are illegal in Nebraska, *see State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428, 436 (Neb. 1991) (per curiam) (labeling video poker, blackjack, and dice machines "gambling devices" within the meaning of Nebraska Revised Statutes § 28-1101), because the possession or operation of a "gambling device," including "any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value," is prohibited, Neb. Rev. Stat. § 28-1101(5) (1995); *see also id.* § 28-1107 (1995). This language is incorporated into related Nebraska statutes authorizing certain forms of gambling in the State. *See id.* §§ 9-204(2) (Supp.1996) (defining "bingo" to exclude any "mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device" and any activity prohibited under Nebraska Revised Statutes Chapter 28, article 11); 9-411(2) (Supp.1996), 9-507(2) (Supp.1996) (defining "lottery" to exclude "any gambling scheme which uses any mechanical, computer, electronic, or video gaming device which has the capability of awarding something of value" and any activity prohibited under Nebraska Revised Statutes Chapter 28, article 11); § 9-312 (Supp.1996) (defining "[l]ottery by the sale of pickle cards" to exclude any activity prohibited under Chapter 28, article 11); *see also id.* §§ 9-607(2) (Supp.1996) (defining "lottery" to exclude "any gambling scheme which uses

any mechanical gaming device, computer gaming device, electronic gaming device or video gaming device"), 9-701(1)(a) (Supp.1996) (excluding from the definition of "gift enterprise" "any . . . player-activated electronic or electromechanical facsimile of any game of chance; or any slot machine of any kind"); 9-803(5)(b) (Supp.1996) ("[l]ottery game shall not be construed to mean any video lottery game"). The video gaming devices operated by the Tribe clearly fall within the definition of prohibited "gambling devices" under Nebraska law and, by virtue of 25 U.S.C. § 2710(d)(1)(B) and 18 U.S.C. § 1166, are likewise prohibited under the IGRA.

The Tribe's argument that its gaming devices are permitted under the Nebraska statutes is not well taken given the uniform prohibition of these devices under the State's statutory scheme. As noted above, the State has consistently excluded from permitted gambling activities the use of gaming devices similar to those operated by the Tribe. The Tribe argues that, because the Nebraska Attorney General and the Nebraska Department of Revenue have approved the use of a device known by the acronym "SLOTS" (Selective Lottery Output Terminal System) to display keno results, the State has approved the use of video gaming devices. This argument, however, fails to take into account the fundamental difference between "SLOTS" and a traditional slot machine. The "SLOTS" device is only a means of allowing keno players to view keno results, and, unlike a slot machine, is not a means of conducting the game itself. *See* Opinion of Nebraska Attorney General at 11 (Sept. 18, 1995).

Because the video gambling engaged in by the Tribe is not permissible under Nebraska law, this activity is

being conducted in violation of the IGRA, and the contention of the United States that it is entitled to an injunction from the District Court enjoining the further conduct of such activity by the Tribe is correct.

**B.**

In denying the government's request for injunctive relief, the District Court relied on the maxim that equity generally will not enjoin the commission of a crime. *See, e.g.*, 11A Charles Alan Wright et al., Federal Practice and Procedure § 2942, at 70 (2d ed.1995). As noted by the District Court, this general rule has three exceptions under which an injunction will issue: 1) in cases of national emergency; 2) in cases of widespread public nuisance; and 3) in cases where a statute grants a court the power to enjoin a crime. *See id.* at 71-74. The government argues that the language of 18 U.S.C. § 1166(a), which makes "all State laws" pertaining to gambling applicable in Indian country, encompasses the State's civil and criminal statutory and case law. According to the government, "all State laws" necessarily includes Nebraska civil case law authorizing injunctive relief to effectuate the closure of gambling establishments determined under State law to be public nuisances. We agree.

The IGRA incorporates by reference "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . in the same manner and to the same extent as such laws apply elsewhere in the State," 18 U.S.C. § 1166(a), and does not distinguish between case law and statutory law. The Rules of Decision Act, 28 U.S.C. § 1652 (1994), provides that the "laws of the several states . . . shall be regarded as rules of decision in civil actions

in the courts of the United States, in cases where they apply." The United States Supreme Court has pronounced that "judicial decisions" are laws of the state within the meaning of the Rules of Decision Act. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464 (1967). We hold that the IGRA's incorporation of "all State laws" includes both state statutory and case law.

In *Strawberries*, the Nebraska Supreme Court specifically held that a gaming operation offering video gambling machines much like those operated by the Tribe constituted a public nuisance under Nebraska law. *See* 473 N.W.2d at 435 (citing cases). The Court further noted that an injunction is the proper remedy to protect "public rights, property, or welfare, whether or not the acts complained of violate a criminal statute or constitute a nuisance." *Id.* at 436. Injunctive relief may be granted by a court "where there has been a continuing and flagrant course of violations of the law even though these acts may be subject to criminal prosecution." *Id.*

Here, the Tribe's conduct of illegal gambling has been "continuing and flagrant" and, although potentially subject to criminal prosecution by the United States under the provisions of the IGRA, this activity is likewise subject to injunctive relief pursuant to applicable Nebraska law. The Tribe's ongoing gambling activity constitutes a continuing and flagrant violation of law that the District Court should have enjoined pursuant to Nebraska law.

Because injunctive relief is available to halt illegal gambling activity under Nebraska State law, *see Strawberries*, 473 N.W.2d at 436-37, this relief has been made available under federal law by virtue of 25 U.S.C. § 1166,

and the District Court erred in refusing to grant the government's request for an order enjoining the Tribe's gaming activities.

V.

The Tribe argues that because of the Supreme Court's determination in *Seminole Tribe* that Congress was not empowered to authorize lawsuits by Indian tribes against states that fail to negotiate in good faith for a tribal-state compact, all provisions of the IGRA related to compacting are unconstitutional. We decline to address this argument given our conclusion that, under the IGRA, the State is not required to negotiate for gambling that is illegal under Nebraska law. *See Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) ("The 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit."); *see also Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993) ("Congress must have meant that gambling devices be legal [within state law] absent the Tribal-State compact; otherwise it would not have been necessary to require both that gambling devices be legal, 25 U.S.C. § 2710(d)(6)(A), and that the compact be 'in effect,' *id.* § 2710(d)(6)(B)."). As we already have determined, the class III gambling activities in which the Tribe is engaged are illegal under Nebraska law, ruling out any duty on the part of the State to negotiate a compact with the Tribe for such gambling.

VI.

The decision of the District Court is reversed and the case remanded for entry of an order enjoining the Tribe's operation of class III gaming devices and enforcing the Chairman's closure order.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

[p. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
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| SANTEE SIOUX TRIBE OF NEBRASKA, Plaintiff, | ) | |
| vs. | ) | 8:CV95-367 |
| UNITED STATES DEPARTMENT OF THE INTERIOR, et al, Defendants. | ) | July 10, 1996 |
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| SANTEE SIOUX TRIBE OF NEBRASKA, Defendant. | ) | |

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE HONORABLE WILLIAM CAMBRIDGE
UNITED STATES DISTRICT JUDGE

[p. 2] The following are my findings of fact and conclusions of law in Case Number 8:CV96-352 and Case Number 8:CV96-367 which were consolidated for trial to the Court. I reserve the right to amend or supplement these findings and conclusions in the event of appeal. Throughout these findings and conclusions, I shall refer to the Santee Sioux Tribe of Nebraska which is the plaintiff in Case Number 8:CV96-352 and the defendant in

Case Number 8:CV96-367 simply as the Tribe. Also, I shall refer to the United States of America which is the defendent in Case Number 8:CV96-352 and the plaintiff in Case Number 8:CV96-367 simply as the United States.

I note that although the Tribe did not name the United States as the defendant in Case Number 8:CV96-352, the Tribe sued the United States Department of the Interior, the Secretary of the Interior, the National Indian Gaming Commission, the Chairman of the National Indian Gaming Commission, the Commissioners of the National Indian Gaming Commission, the United States Attorney General, and the United States District Attorney for the District of Nebraska in their official capacities. Thus, 8:CV96-352 is actually a suit against the United States as defendant.

(1) This Court has jurisdiction under 28 U.S.C., Section 1331 and 28 U.S.C., Section 1345.

(2) The Santee Sioux Tribe of Nebraska is a federally recognized Indian tribe.

[p. 3] (3) On April 25th, 1996, the Chairman of the National Indian Gaming Commission, hereinafter referred to as the Chairman, issued a notice of violation stating that the Tribe was operating Class III gaming on its reservation in the absence of a tribal-state compact in violation of 25 U.S.C., Section 2710(d). The Chairman ordered the Tribe to remove all Class III gaming machines from the Tribe's casino and to cease and desist all Class III gaming activities by no later than noon on May 1st, 1996.

(4) On April 30th, 1996, the Chairman held an informal hearing on the notice of violation.

(5) On May 1st, 1996, the Chairman issued a revised order of temporary closure ordering the Tribe to close its casino by noon on May 3rd, 1996.

(6) On May 2, 1996, the Chairman issued a Decision on Expedited Review in which the Chairman found that his earlier order ordering temporary closure of the casino should not be rescinded.

(7) The Tribe's first claim for relief in 8:CV96-352 asks the Court to review the Chairman's April 25th and May 1st orders as well as the Chairman's May 2nd decision.

(8) Section 704 of Title 5 of the United States Code states that, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review. A [p. 4] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section, whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

(9) After granting the Chairman the power to order temporary closure of an Indian casino, Section 2713(b) of Title 25 of the United States Code states as follows:

"Not later than 30 days after the issuance by the Chairman of an order of temporary closure, the Indian tribe. . . . involved shall have a right to a hearing before the Commission (meaning the National Indian Gaming Commission) to determine whether such order should be made permanent or dissolved. Not later than 60 days following such hearing, the Commission shall by a vote of not less than two of its members decide whether to order permanent closure of the gaming operation." See 25 U.S.C., Section 2713(b)(2).

(10) Section 2713(c) of Title 25 of the United States Code which is entitled, "Appeal from Final Decision" then states that, "A decision of the Commission to order a [p. 5] permanent closure pursuant to this section shall be appealable to the appropriate Federal District Court pursuant to Chapter 7 of Title 5." Furthermore, I note that Section 2714 of Title 25 of the United States Code which is entitled "Judicial Review" states that, "Decisions made by the Commission pursuant to Section 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for the purposes of appeal to the appropriate Federal District Court pursuant to Chapter 7 of Title 5.

(11) On May 16, 1996, the Tribe appealed the Chairman's April 25th and May 1st orders and the Chairman's May 2nd decision to the Commission. At this time the Commission has not issued its decision on that appeal.

(12) Based on the foregoing and referring to Section 704 of Title 5, it is clear that the Chairman's temporary

closure order is not an "agency action otherwise final"; that such order is a preliminary, procedural or intermediate agency action or ruling that is not directly reviewable, but is subject to review on the review of the final agency action. And therefore, at this point, the Tribe has failed to exhaust its administrative remedies.

(13) Although the tribe has advanced several reasons why its failure to exhaust should be excused, I find none of them persuasive. Specifically the Tribe has failed to prove that its appeal to the Commission is a futile exercise.

[p. 6] Furthermore, the Tribe has failed to show that it will suffer irreparable harm if the Court does not immediately review the Chairman's orders and decision.

(14) Therefore, I find that the Tribe's first claim for relief in Case Number 8:CV96-352 must be dismissed for failure to exhaust administrative remedies.

(15) The Tribe's second claim for relief in 8:CV96-352 asserts a breach of trust claim. Specifically, the Tribe asserts that the United States has a duty to promulgate regulations and procedures for the Tribe's gaming activities in lieu of the tribal-state compact and/or to enter into a compact with the Tribe.

(16) In *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995), the District of Columbia Circuit stated that, "While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, *United States vs. Cherokee Indian Nation of Oklahoma*, 480 U.S. 700, at 707, 107 S.Ct. 1487 at 1491, 94 L.Ed.2d 704, (1987), it is also true that the government's fiduciary

responsibilities necessarily depend on the substantive law creating those obligations. *United States vs. Mitchell*, 463 U.S. 206 at 224-225, 103 S.Ct. 2961 at 2971-72, 77 L.Ed.2d 580 (1983) (Mitchell I); *United States vs. Mitchell*, 445 U.S. 535 at 542, 100 S.Ct., 1349 at page 1353, 63 L.Ed.2d 607, (1980) (Mitchell II), an Indian tribe cannot [p. 7] force the government to take a specific action unless a treaty, statute, or agreement imposes expressly or by implication that duty. Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one. *National Wildlife Federation vs. Andrus*, 642 F.2d 589, 612 (D.C. Cir.) 1980. *Shoshone*, 56 F.3d at 1482.

(17) The Tribe has not cited and the Court has not found any substantive provision of law creating a fiduciary obligation on the part of the United States to promulgate procedures for the Tribe's gaming or to enter into a compact with the Tribe.

(18) Furthermore, I note that the Department of the Interior has published an "Advance Notice of Proposed Rulemaking" in which the Department requested comments on establishing departmental procedures to authorize Class III gaming on Indian lands when a state raises an 11th Amendment defense to suit under the Indian Gaming Regulatory Act. See 61 F.R. 21394, (May 10, 1996). Thus, even if the United States has some limited fiduciary obligation to promulgate procedures for the Tribe's gaming or to enter into a compact with the Tribe, I find that the United States is honoring that fiduciary obligation by the Department of the Interior's ongoing rulemaking process.

[p. 8] (19) Accordingly, I find the Tribe's second claim for relief in 8:CV96-352 must be dismissed.

(20) The Tribe's third claim for relief in 8:CV96-352 essentially asserts an equal protection claim. The Tribe asserts that the United States is treating it differently than the State of Nebraska in that the United States is prosecuting the Tribe for violations of federal gambling laws while the United States is not prosecuting the State of Nebraska for violations of federal gambling laws.

(21) I find the Tribe's third claim for relief in 8:CV96-352 to be without merit. The Tribe has failed to prove that the State of Nebraska is violating any federal gambling laws. Furthermore, even if the Tribe would be able to make such a showing, the Tribe has failed to prove that it is a similarly-situated party to the State.

(22) The Tribe's fourth claim for relief in 8:CV96-352 asserts another breach of trust claim. Specifically the Tribe alleges that the United States owes the Tribe an affirmative obligation to take affirmative steps against the State of Nebraska for the State of Nebraska's, "known scheme to deprive the Tribe of its statutory and sovereign gaming rights which are also constitutionally protected property rights". Further, the Tribe alleges that the United States has knowingly aided and abetted the State of Nebraska in the State of Nebraska's scheme.

[p. 9] (23) I find the Tribe's fourth claim for relief must be dismissed for the same reason that the Tribe's second claim for relief was dismissed; that is, there exists no substantive provision of law creating a fiduciary obligation on the part of the United States to take affirmative steps against the State of Nebraska.

(24) I further find the Tribe's fourth claim for relief in 8:CV96-352 to be spurious. The Tribe has presented absolutely no evidence of any illegal scheme by the State of Nebraska to deprive the Tribe of any of the Tribe's statutory or constitutional rights. Furthermore, the Tribe has presented absolutely no evidence that the United States aided and abetted any such scheme.

(25) In sum, because I find that all of the Tribe's claims for relief in 8:CV96-352 should be dismissed, I order the Tribe's complaint in 8:CV96-352 dismissed with costs taxed to the Tribe.

(26) The United States' first claim for relief in 8:CV96-367 seeks: (One) a judgment from this Court declaring that the Tribe's gaming activity on its reservation violates federal and state law; and (two) an order of this Court ordering the Tribe to close its casino. The United States' second claim for relief in 8:CV96-367 seeks an order of this Court enjoining the Tribe from operating its casino.

(27) Although it would appear that the Chairman's closure [p. 10] order does remain in effect notwithstanding the Tribe's appeal of that order to the Commission, I find that the United States is not entitled to civil injunctive relief enforcing that order. The order is temporary in nature only, with its civil enforcement vested at the present time under the law in the Chairman and the Commission. Section 2713(a) of Title 25 of the United States Code specifically gives the Chairman the power to levy fines against the Tribe which can be appealed to the Commission.

On the other hand, criminal enforcement of the law is vested in the Department of Justice of the United States. The Department of Justice presently has and has had the power to bring criminal charges against any person, organization or entity that is purportedly violating federal criminal law.

(28) The United States claims that the Tribe's casino is being operated in violation of federal law, that is, federal criminal law. However, this Court should not at this time pass on that question because, as a general rule, courts will not enjoin the violation of criminal laws. See, for example, *United States vs. Jalas*, 409 F.2d 358 at 360 (7th Cir. 1969), reciting the doctrine that courts have no power to enjoin the commission of a crime, and citing 5 J. Moore Federal Practice, Paragraph 38.24(3) at 192, (2d Ed., 1968); *United States vs. Menominee Indian Tribe of Wisconsin*, 694 F.Supp., 1373, at page 1376, (E.D. Wis. 1988). The rule is that equity [p. 11] will not enjoin the commission of a crime, citing inter alia 11 Wright & Miller, *Federal Practice and Procedure: Civil Section 2942*.

While this rule is subject to three exceptions, (one) in the cases of national emergency; (two) in cases of widespread public nuisance; and (three) in cases where a statute grants a court the power to enjoin a crime, see, for example, *Jalas*, 409 F.2d at 360, I find on the record made in this case that none of these three exceptions are applicable here.

(29) In sum, because I find the United States is not entitled to the relief it seeks in Case Number 8:CV96-367, I find that Case Number 8:CV96-367 must be dismissed with costs taxed to the United States, and I so order.

(30) The clerk of the court is hereby directed to forthwith enter judgments in accordance with these findings and conclusions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| UNITED STATES OF AMERICA,<br>PLAINTIFF,<br>v.<br>SANTEE SIOUX TRIBE OF NEBRASKA,<br>DEFENDANT(S). | 8:CV96-00367<br>**AMENDED**<br>JUDGMENT<br>(Filed Jul 12, 1996) |

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that judgment is entered in favor of the Defendant, Santee Sioux Tribe of Nebraska, and against the Plaintiff, United States of America with costs taxed to the Plaintiff.

Dated this 12th day of July, 1996.

NORBERT H. EBEL
Clerk of Court

By /s/ Patricia C. Veylupek
Patricia C. Veylupek
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>SANTEE SIOUX TRIBE OF NEBRASKA, A Federally Recognized Indian Tribe,<br><br>Defendant. | ) | 8:CV96-367<br><br>**MEMORANDUM OPINION AND ORDER**<br><br>(Filed Dec. 31, 1996) |

This matter is before the Court on the plaintiff's motion for reconsideration (filing 16-1), the plaintiff's motion to alter or amend judgment (filing 16-2), the plaintiff's request for oral argument (filing 16-3), and the plaintiff's motion for leave to file supplemental pleading to supplement original complaint (filing 17). As explained below, the Court finds that the plaintiff's motion for reconsideration should be stricken[1], that the plaintiff's request for oral argument should be denied[2], that the

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[1] The Court finds that the motion for reconsideration should be stricken based on the Eighth Circuit's admonition that

> Aggrieved parties in bench trials should not file motions labeled "motion for reconsideration" in federal district court. The Federal Rules of Civil Procedure do not provide for such a motion. Instead, the motion should be properly designated under the rule authorizing the motion, such as Rule 52 or 59.

*Sanders v. Clemco Indus.*, 862 F.2d 161, 170 (8th Cir. 1988).

[2] The Court finds that oral argument on the motion to alter or amend judgment would serve no useful purpose in light of

plaintiff's motion to alter or amend judgment should be denied, and that the plaintiff's motion for leave to file supplemental pleading should be denied.

**Background**

Before discussing the plaintiff's motion to alter or amend and the plaintiff's motion for leave to file supplemental pleading, the Court considers it necessary to explain both its understanding of the plaintiff's complaint and its reasons for entering judgment against the plaintiff in this action.

The complaint, filed by the United States Attorney on behalf of the United States, sought an injunction ordering the Santee Sioux Tribe of Nebraska to close its casino. This request for relief was based on two separate, alternate theories. Under the first theory, which the Court will refer to as the "statutory theory", the United States Attorney claimed that the plaintiff was entitled to the injunction based on federal gambling laws, including those federal gambling laws which incorporate state gambling laws. Under the second theory, which the Court will refer to as the "administrative order theory", the United States Attorney claimed that the plaintiff was entitled to the injunction based on an inherent power of the United States Attorney to enforce the temporary order of closure entered by the Chairman of the National Indian Gaming Commission.

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the extensive and thorough briefs submitted by the parties on that motion.

In entering judgment against the plaintiff, the Court declined to grant the plaintiff an injunction on either of the United States Attorney's theories. First, the Court rejected the statutory theory, which sought, in essence, an injunction of criminal activity, on the merits of that theory based on the general rule that a court of equity will not enjoin a crime.[3] In doing so, the Court found that the United States Attorney had failed to present evidence sufficient to warrant a finding that any of the three exceptions to that general rule existed[4]; specifically, the Court found that the United States Attorney had failed to prove that the Tribe's casino constituted a public nuisance, needless [sic] a widespread public nuisance. Second, without passing on the merits of the administrative order theory, the Court declined to grant the plaintiff relief on that theory for the reasons that the Chairman's closure order was temporary in nature and that the Chairman's closure order had been appealed to the full National Indian Gaming Commission. Because that appeal was still proceeding at the time the Court entered judgment, and out of deference to the Commission, the Court found it inappropriate to pass on either the correctness or the enforceability of the Chairman's closure order before giving the full Commission a chance to do so.[5]

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[3] This well-settled general rule has been set forth in many cases including *United States v. Jalas*, 409 F.2d 358, 360 (7th Cir. 1969).

[4] The three exceptions are (1) cases of national emergency, (2) cases of widespread public nuisance, and (3) situations in which a court possesses a statutory grant of the power to enjoin a crime. *See, e.g., Jalas*, 409 F.2d at 360.

[5] The Court realizes that its judgment could also be read as having found against the plaintiff on the merits of the

### Motion to Alter or Amend Judgment

In the motion to alter or amend judgment, the United States Attorney claims that the Court should alter its judgment based on the "fact" that the National Indian Gaming Commission has now entered a "permanent" order upholding the Chairman's temporary order of closure. However, the Court does not agree that the judgment should be altered based on this occurrence. In the first place, the Court's rejection of the statutory theory was not at all dependent on the Chairman's closure order. Furthermore, the Court's decision to abstain from passing on the merits of the administrative order theory is in no way affected by the fact that the Chairman's temporary closure order has now been upheld and superseded by the full Commission's order; abstention was the proper course to take in light of the Tribe's then-pending appeal to the full Commission. In sum, the Court finds that the judgment entered was correct based on the law and based on the facts as they existed at the time judgment was entered. Thus, the Court will deny the plaintiff's motion to alter or amend judgment.

### Motion for Leave to File Supplemental Pleading

In the motion for leave to file supplemental pleading, the plaintiff asks the Court to vacate it [sic] judgment and

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administrative order theory. However, the Court did not intend to pass on the merits of the administrative order theory. To the extent the Court's opinion arguably commented on the merits of the administrative order theory, the Court's comments were not essential to the judgment and are dicta.

to allow the plaintiff to file a supplemental complaint setting forth the National Indian Gaming Commission's permanent order.

Insofar as the plaintiff wishes to supplement its statutory theory with the Commission's order, the Court finds supplementation wholly inappropriate. The Commission's order would in no way bolster the plaintiff's argument that an injunction is available under federal gambling laws. More importantly, in entering the final judgment against the plaintiff, the Court was required to pass *on the merits* of the plaintiff's statutory theory. Thus, to allow supplementation of the complaint as to that theory would severely prejudice the Tribe because, as things stand now, the doctrine of issue preclusion estops the plaintiff from relitigating the statutory theory at least insofar as the United States Attorney claims that the Tribe's casino constituted a widespread public nuisance up to and as of the date judgment was entered.[6]

While the Court did not pass on the merits of the plaintiff's administrative order theory, the Court finds supplementation as to that theory to be inappropriate as well. The Court is concerned by the apparent lack of participation by the National Indian Gaming Commission in this litigation; as far as the Court can gather, the Commission has neither authorized nor directed the United States Attorney to attempt to enforce the Commission's order by seeking a civil injunction. While the United States Attorney clearly has the power to enforce

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[6] The Court notes that, if the plaintiff wishes to challenge the Court's finding on the statutory theory, the plaintiff must appeal that finding.

federal criminal laws, Congress has given the National Indian Gaming Commission certain powers to civilly enforce the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2713(a)(1) (giving the Chairman of the Commission the authority to levy and collect civil fines of up to $25,000 per violation of the Act). The Court is troubled by the prospect that the United States Attorney may be attempting to enforce the Commission's order via a civil action seeking an injunction when the Commission may have chosen to forego enforcing its order or may have chosen to enforce its order in another manner. For, just as the United States Attorney has discretion in deciding whether or not to prosecute a crime[7], the Commission

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[7] For example, while the United States Attorney has repeatedly asserted his belief that the Tribe's casino operation violates federal criminal laws, *see, e.g.*, filing 1 (plaintiff's complaint), ¶ 27 (alleging that "under 15 U.S.C. §1175, the possession and operation of gambling devices . . . in Indian Country are prohibited. The Tribe's Class III gambling activities are in violation of 15 U.S.C. § 1175 . . . ") & ¶ 28 (alleging that "the recommencement of Class III gaming otherwise not permitted in the State violates 18 U.S.C. § 1166 and 15 U.S.C. § 1175. Plaintiff is informed and believes, and on that basis alleges, that the Tribe will continue to conduct illegal Class III gambling . . . "), and while the United States Attorney has the duty to enforce all federal criminal laws, see 28 U.S.C. § 547(1) (stating that, "[e]xcept as otherwise provided by law, each United States attorney, within his district, shall . . . prosecute for all offenses against the United States"), the United States Attorney has chosen, in his discretion, not to enforce those laws and to bring no criminal prosecutions based on his stated beliefs. However, this is clearly the United States Attorney's prerogative under the law. *See Massey v. Smith*, 555 F.2d 1355, 1356 (8th Cir. 1977) ("The authority to decide against whom federal indictments shall be sought lies almost exclusively with

must have discretion to decide whether or not to enforce one of its orders as well as discretion to decide how to best go about enforcing one of its orders once it has decided to enforce it. Furthermore, the United States Attorney cites no provision of law, and this Court finds none, which would give one agency within the executive branch, in this case the Department of Justice, the power to negate a discretionary decision made by another agency within the executive branch, in this case the National Indian Gaming Commission of the Department of the Interior, when, as is the case here, the first agency is not superior to the second agency.[8] Thus, because the Court finds that the National Indian Gaming Commission should be involved in whatever civil enforcement action is taken and because it appears that the Commission is not involved here, the Court will deny the plaintiff's motion for leave to file supplemental pleading.

**Conclusion**

In sum, the Court will deny the plaintiff all that it seeks in the filings now before the Court. However, the Court notes that the plaintiff, i.e. the executive branch of the United States government, is not without recourse. In

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the United States Attorneys or the Justice Department, and their decisions in this regard are not generally subject to judicial review.").

[8] The Court notes that any differences of opinion which may exist between the United States Attorney and the Commission as to the issues presented by the Tribe's class III gaming operation cannot be decided by this Court, but instead must be decided within the executive branch itself.

the Indian Gaming Regulatory Act, Congress vested the National Indian Gaming Commission with certain powers so that the Commission could civilly enforce the Act if it chose to do so. Furthermore, the Court reiterates that, if the United States Attorney believes that the Tribe's casino operation violates federal criminal laws, the United States Attorney has the power to both prosecute those the United States Attorney believes are responsible for any such violations and to seize and attempt to forfeit any property that the United States Attorney believes is being used in any such violations. *See, e.g.*, 28 U.S.C. § 547(1) (stating that "[e]xcept as otherwise provided by law, each United States Attorney, within his district, shall . . . prosecute for all offenses against the United States"); 18 U.S.C. § 1166(b) & (c) ("Whoever in Indian country is guilty of any act or omission involving gambling . . . which . . . would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred [except those acts or omissions which comply with the terms of the Indian Gaming Regulatory Act,] . . . shall be guilty of a like offense and subject to like punishment"); 15 U.S.C. § 1175(a) (stating that "[i]t shall be unlawful to . . . possess, or use any gambling device . . . within Indian country"); 18 U.S.C. § 1955(a) ("Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both."); *id.* at § 1955(c) (defining the term 'gambling' to include "maintaining slot machines"); *id.* at § 1955(d) (stating that "[a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States").

Whether the executive branch elects to pursue any of the options open to it is a discretionary decision of the executive branch that is not reviewable by this Court under these circumstances.

**Order**

Based on the foregoing memorandum opinion, it is ordered that

1. the plaintiff's motion for reconsideration (filing 16-1) is stricken;

2. the plaintiff's motion to alter or amend judgment (filing 16-2) is denied;

3. the plaintiff's request for oral argument (filing 16-3) is denied; and

4. the plaintiff's motion for leave to file supplemental pleading to supplement original complaint (filing 17) is denied.

Dated this 31st day of December, 1996.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
Chief Judge
United States District Court

NOTICE OF VIOLATION

Ref. No.: NOV-96-01
April 25, 1996

To: Mr. Butch Denny
Chairman
Santee Sioux Tribe of Nebraska
Respondent

1. The Chairman of the National Indian Gaming Commission (NIGC) hereby gives notice that the Santee Sioux Tribe of Nebraska (hereafter referred to as "Respondent"), located in Knox County, Nebraska is in violation of the Indian Gaming Regulatory Act (IGRA) and NIGC regulations.[1]

2. The circumstances of the violations are:

The Respondent is a federally recognized Indian Tribe with tribal headquarters in Noibrara [sic], Nebraska. From February 1996 through April 22, 1996 the Respondent has operated a gaming operation on tribal lands located in Niobrara, Nebraska. The Respondent has offered video poker and video black jack machines for play at the gaming operation throughout this period.

3. The Respondent is in violation of NIGC regulations as follows:

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[1] NIGC regulations are set forth in Chapter III, Title 25, Parts 500-599 of the Code of Federal Regulations. All sections of NIGC regulations cited in this Notice refer to the pertinent parts of Title 25. NIGC regulations implement provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 et seq., signed into law on October 17, 1988.

Under Section 502.4 of the NIGC's regulations, Class III gaming means all forms of gaming that are not class I gaming or class II gaming specifically including (but not limited to) any slot machines as defined in 15 U.S.C. § 1171(a)(1) and electronic or electromechanical facsimiles[2] of any game of chance.

Since February 1996, the Respondent has offered a variety of video machines which are electromechanical facsimiles of the game of poker and blackjack for play at Respondent's gaming operation. These maehines fall within the definition of Class III gaming. The Respondent does not have a compact with the State of Nebraska which authorizes the playing of video poker machines or video blackjack machines at the Respondent's gaming casino.

Accordingly, the Respondent is operating Class III games in the absence of a tribal-state compact in violation of 25 U.S.C. 2710(d) and Section 573.6(a)11.

4. The measures required to correct the violations are:

The Respondent should remove all Class III gaming machines from the gaming operation and cease and desist all Class III gaming activities.

5. The corrective measures described in paragraph 4 above must be accomplished by 12 o'clock noon, May 1, 1996.

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[2] An electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. § 1171(a)(2) or (3). *See* Section 502.8.

6. The violations cited in this notice of violation may result in the assessment of civil fines against the Respondent in an amount not to exceed $25,000 per violation per day. Under Section 575.5(a), the Respondent may submit written information about the violation to the Chairman within 15 days after service of this notice of violation (or such longer period as the Chairman of the Commission may grant for good cause). The Chairman shall consider any information submitted in determining the facts surrounding the violation and the amount of the civil fine, if any. Such information should be submitted to: Chairman, National Indian Gaming Commission, 1441 L Street, NW, 9th Floor, Washington, D.C. 20005.

7. Under Section 577.3, the Respondent may appeal the allegations contained in this notice of violation to the full Commission within 30 days after service of this notice of violation. The Respondent may appeal the allegations by submitting a notice of appeal to the Commission at the address set forth in paragraph 6 above. The Respondent has a right to be represented by counsel in such an appeal. A notice of appeal must reference this notice of violation. Within ten days after filing a notice of appeal, the Respondent must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits.

If the Respondent wishes to present oral testimony or witnesses at a hearing, the Respondent must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general

nature of their expected testimony, and whether a closed hearing is requested and why. The Respondent may waive the right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

8. A copy of the regulations contained in the Federal Register of January 22, 1993, is attached for your information. The attachment contains the full text and explanations of the regulations cited in this notice of violation.

/s/ Harold A. Monteau
Harold A. Monteau
Chairman
National Indian
Gaming Commission

## ORDER OF TEMPORARY CLOSURE

To: Mr. Butch Denny
Chairman
Santee Sioux Tribe of Nebraska
Respondent

Ref. No.: CO-96-01
April 25, 1996

1. Under the authority of 25 U.S.C. §2701 *et seq.* and 25 CFR Part 573, the Chairman of the National Indian Gaming Commission hereby gives notice that the Santee Sioux Tribe of Nebraska is ordered to close its gaming Casino located on Trust lands in Knox County Nebraska by 12 o'clock, noon, May 1, 1996. This action is necessary due to violations of 25 CFR §573.6(a)(11) of the regulations of the National Indian Gaming Commission as described in Notice of Violation No. NOV-96-01 issued April 25, 1996.

2. The Chairman of the Commission may rescind this Order for good cause shown.

3. Under 25 CFR §573.6(c), within seven (7) days after service of this Order, the Respondent may request, orally or in writing, informal expedited review by the Chairman. The Chairman must complete such review within two (2) days after receipt of a timely request. Within two (2) days after the expedited review provided by 25 CFR §573.6(c), the Chairman must decide whether to continue the Order and must provide the Respondent with an explanation of the basis for the decision.

4. Whether or not a Respondent seeks the informal expedited review described in paragraph 3 above, within

30 (thirty) days after service of this Order, the Respondent may appeal to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal to the National Indian Gaming Commission, 1441 L Street, NW, Ninth Floor, Washington, DC 20005. The Respondent has a right to assistance of counsel in such an appeal. A notice of appeal must reference this Order.

5. Within ten (10) days after filing a notice of appeal, the Respondent must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If the Respondent wishes to present oral testimony or witnesses at the hearing, the Respondent must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, whether a closed hearing is requested and why. The Respondent may waive its right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

Dated this 25rd [sic] day of April, 1996.

/s/ Harold A. Monteau
Harold A. Monteau
Chairman
National Indian
Gaming Commission

To: Mr. Butch Denny
Chairman
Santee Sioux Tribe of Nebraska
Respondent

Ref. No. CO-96-01

DECISION OF THE CHAIRMAN
ON EXPEDITED REVIEW

On April 25, 1996, the National Indian Gaming Commission (Commission) issued a Notice of Violation and an Order of Temporary Closure to the Santee Sioux of Niobrara, Nebraska (hereafter referred to as the "Respondent" or the "Tribe"). The Notice of Violation alleged that the Respondent had violated the Indian Gaming Regulatory Act and the regulations of the Commission by offering Class III video games in its casino. There is no compact between the Tribe and the State of Nebraska which authorizes the playing of such video games. The Temporary Closure Order directed the Respondent to cease all Class III gaming activities in its casino by 12 o'clock, noon, on May 1, 1996.

Following the issuance of these documents, the Respondent requested, both orally and in writing an informal, expedited review of this matter pursuant to Section 573.6(c) of the Commission's regulations. Such a review was conducted in the Commission's offices on Wednesday, April 1, 1996. The Respondent was represented by its Chairman and Vice-Chairman, numerous members of its tribal council, the manager of its casino and attorneys from the law firm of Peebles and Evans. At the review the Respondent presented a number of arguments and submitted a substantial number of documents

in support of its request to rescind the closure order. At the conclusion of the hearing, the Respondent requested that the date of the closure be extended to permit the Chairman to make his decision on the expedited review before the closure order became effective. That request was granted and on May 1, 1996, the Chairman issued a Revised Order of Temporary Closure extending the closure date until 12 o'clock, noon on May 3, 1996.

In accordance with Section 573.(c)(2) of the Commission's regulations, set forth below is the Chairman's decision with regard to the Respondent's request for expedited review.

I have determined that the closure order should not be rescinded. The basis for my decision is as follows:

1. The Respondent raised a number of arguments with regard to compact negotiations between the Tribe and the State of Nebraska. These arguments were supported by documents which raise serious concerns about the fairness of this process. Despite the equitable considerations raised by the Tribe, the fact remains that Commission does not have the authority to address issues related to process by which tribal-state compacts are negotiated. Under the Indian Gaming Regulatory Act it is the Secretary of the Interior who is responsible for approving tribal-state compacts. Accordingly, the arguments raised by the Tribe concerning compact negotiations with the State of Nebraska do not represent a basis for rescinding the closure order.

2. The Tribe made a highly persuasive presentation with regard to the importance of the jobs generated at the casino as a result of gaming and the critical needs being

met by the gaming revenues. I fully recognize how significant these considerations are to a tribe which currently has an unemployment rate of 74%. Unfortunately, despite the obvious good they are doing, the Casino revenues are being generated from Class III gaming activities which are not authorized by a tribal-state compact. Such activities constitute a substantial violation of the Commission's regulations which authorizes the issuance of a closure order. *See* Section 573.6(a)(11). The Respondent, should it choose to do so, will have an opportunity to attempt to assert these equitable arguments before the full Commission in the course of its appeal.

Given current circumstances in the State of Nebraska, I have no choice but to order the closure of the Class III gaming activity presently being conducted in the Respondent's casino. It is my hope that doing so will result in a change of circumstances which ultimately will permit Class III gaming activities to resume pursuant to a compact between the Tribe and the State of Nebraska.

Within 30 (thirty) days after service of the Revised Closure Order, the Respondent may appeal to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal to the National Indian Gaming Commission, 1441 L Street, N.W., Ninth Floor, Washington, D.C. 20005. The Respondent has a right to assistance of counsel in such an appeal. A notice of appeal must reference the Revised Closure Order.

Date: May 2, 1996 /s/ Harold A. Monteau
Harold A. Monteau
Chairman
National Indian
Gaming Commission

NATIONAL INDIAN GAMING COMMISSION

Butch Denny, Chairman, Santee Sioux Tribe of Nebraska

Appellant

vs.

Chairman, National Indian Gaming Commission

Appellee

Ref. No. NOV-96-01
Ref. No. CO-96-01

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IN THE MATTER OF
SANTEE SIOUX TRIBE OF NEBRASKA

Appeal to the National Indian Gaming Commission from an order of temporary closure issued by the Commission's Chairman in regard to a class III gaming facility operated by the Santee Sioux Tribe of Nebraska.

APPEARANCES: John M. Peebles, Esq., and Conly J. Schulte, Esq., Omaha, Nebraska, for the Santee Sioux Tribe of Nebraska; Michael Cox, Esq., and Christine A. Lambert, Esq., National Indian Gaming Commission, Washington, D.C., for the Chairman.

ORDER

The Santee Sioux Tribe of Nebraska (Tribe) sought review of a May 2, 1996, decision on expedited review issued by the Chairman of the National Indian Gaming Commission (Chairman; Commission), pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1994).[1] The May 2 decision, which related

to a gaming operation being conducted by the Tribe on tribal land in the State of Nebraska, was preceded by an April 25, 1996, notice of violation and order of temporary closure and a May 1, 1996, revised order of temporary closure. The Tribe appealed the May 2 order to the full Commission under 25 C.F.R. Part 577.

## Legal Framework

Congress stated its findings and policy in regard to Indian gaming in 25 U.S.C. §§ 2701-02:

> § 2701. Congressional findings
>
> The Congress finds that –
>
> (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
>
> (2) Federal courts have held that [25 U.S.C. § 81] requires * * * review [by the Secretary of the Interior (Secretary)] of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
>
> (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
>
> (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if

the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2702. Congressional declaration of policy

The purpose of this chapter is –

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

IGRA distinguishes between three types of gaming activities, classes I, II, and III. This case concerns only class III gaming, which is governed by 25 U.S.C. § 2710(d). Section 2710(d) provides in pertinent part:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by [a tribal] ordinance or resolution * * * ,

* * *

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

* * *

(6) The provisions of section 1175 of Title 15 [the Gambling Devices Act of 1962, also known as the Johnson Act] shall not apply to any gaming conducted under a Tribal-State compact that –

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact * * * or to conduct such negotiations in good faith,

* * *

(B)(i) An Indian tribe may initiate a cause of action described under subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

* * *

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a [court-appointed] mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

In *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996) (*Seminole*), the Supreme Court held that, although Congress clearly intended in 25 U.S.C. § 2710(d)(7) to abrogate the states' sovereign immunity, "[t]he Eleventh Amendment prohibits Congress from

making the [states] capable of being sued in federal court" (116 S.Ct. at 1133).[2] The Court also held that it would not apply the decision in *Ex parte Young*, 209 U.S. 123 (1908), to allow suit to go forward against the governor of the state, because of concerns over "the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*" (*Id.*).

Section 2721 of 25 U.S.C. of IGRA is a severability clause, which provides: "In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect." After holding the Federal court enforcement provisions of IGRA unconstitutional, the Supreme Court did not undertake to determine how much of IGRA remained intact, instead stating in note 18, 116 S.Ct. at 1133: "We do not here consider, and express no opinion upon, that portion of the decision below that provides a substitute remedy for a tribe bringing suit. See [*Seminole Tribe of Florida v. Florida*,] 11 F.3d 1016, 1029 ([11th Cir.] 1994)" (*Seminole Circuit*).

In *Seminole Circuit* the circuit court had stated:

> As a result of our holding that the federal courts do not have jurisdiction to reach the issues brought by the tribe in these two suits, the procedures found in §§ 2710(d)(7)(A)(i) and

(B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit.[x]

The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause, § 2721; and we find no "strong evidence" to ignore that plain congressional directive. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 * * * (1987). Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

x A state may consent to suit, in which case these provisions remain in full force. *See, e.g., Rumsey Indian Rancheria of Wintun Indians v. Wilson*, No. Civ-S-92-812 GEB, 1993 WL 360652 (E.D. Cal. July 20, 1993), in which defendants waived their Eleventh Amendment immunity.

After the decision in *Seminole*, the Assistant Secretary – Indian Affairs, Department of the Interior, published an advance notice of proposed rulemaking at 92 FR 21394

(May 10, 1996), corrected at 92 FR 25604 (May 22, 1996). This notice stated:

> The Department seeks comments on the following specific issues, and on other issues directly related to the subject matter of this notice.
>
> (1) The effect of the Supreme Court's decision in [*Seminole*] on the operation of other provisions in 25 U.S.C. Section 2710(d)(7) when a State does not waive its Eleventh Amendment immunity to suit;
>
> (2) Whether, and under what circumstances, the Secretary of the Interior is empowered to prescribe "procedures" for the conduct of Class III gaming when a State interposes an Eleventh Amendment defense to an action pursuant to 25 U.S.C. Section 2710(d)(7)(B);
>
> (3) What is an appropriate administrative process for the development of Secretarial procedures;
>
> (4) What procedures should be followed if a State interposes an Eleventh Amendment defense to an action filed under 25 U.S.C. Section 2710(d)(7)(B);
>
> (5) What procedures can be, and should be, utilized for determining legal issues that may be in dispute, such as the "scope of gaming" permitted under State law. The scope of gaming issue arises when a State takes the position that it is not required to bargain with a Tribe with respect to certain Class III games because IGRA does not authorize such games on the ground that such games are not permitted

by the State "for any purpose by any person," *see* 25 U.S.C. Section 2710(d)(1)(B)1; and

(6) How any procedures promulgated by the Secretary may, and should, provide for appropriate regulation of Indian gaming.

(92 FR at 21395).

## Factual Background

In March 1993, the Tribe requested the State of Nebraska to enter into negotiations for a compact pursuant to IGRA. The Nebraska legislature has since authorized the Governor or his delegate to negotiate such compacts. For purposes of this discussion, the Governor will be referred to as the person or entity responsible for negotiations.

The following factual discussion is taken primarily from the Tribe's filings and is assumed to be true for purposes of deciding this appeal. Compact negotiation sessions were held in April and May of 1993. After these sessions, the Tribe prepared a draft compact and submitted it to the Governor for negotiation purposes. The Tribe indicates that at a subsequent negotiation session, the Governor stated his conclusion that IGRA assimilated State statutory law.

In July 1993, the Tribe presented the Governor with its differing legal analysis of IGRA. A negotiation session scheduled for September 1993 was canceled after a state employee was quoted in a newspaper article as saying that the Governor would not compact for casino gaming.

Negotiation sessions were held in November and December 1993. According to the Tribe, at a negotiation session in February 1994, the Governor offered to enter into a compact encompassing all issues upon which there was agreement, and to provide for litigation over those issues on which no agreement had been reached. The Tribe states that the Governor agreed to its request that the State not raise a Tenth or Eleventh Amendment defense to such a suit.[3]

In February 1994, the Tribal Council approved the proposed compact, including the dispute resolution process, conditioned on the Governor's agreement not to assert Tenth and/or Eleventh Amendment defenses. Additional negotiation sessions were held, but when the Governor indicated that Tenth and/or Eleventh Amendment defenses would be raised, negotiations ended.

On February 2, 1996, the Tribe filed suit against the State in United States District Court for the District of Nebraska, alleging that the State and the Governor had failed to negotiate in good faith. *Santee Sioux Tribe of Nebraska v. Nebraska*, Case No. 8:96CV115. As forewarned, the State raised the Eleventh Amendment as a defense. Also on February 2, 1996, the Tribe opened a class III gaming facility, the Ohiya Casino, on Tribal lands.

The Supreme Court decided *Seminole* while the Tribe's case was pending in district court. On April 26, 1996, the district court dismissed the Tribe's case based on the holding in *Seminole*.

Pursuant to his authority under IGRA, on April 25, 1996, the Chairman issued a notice of violation and temporary closure order requiring the Tribe to close the

Ohiya Casino on or before May 1, 1996. The Tribe requested and was granted informal expedited review before the Chairman. A hearing was held on April 30, 1996. On May 1, 1996, the Chairman issued a revised order of temporary closure, giving the Tribe an additional 2 days, until May 3, 1996, to close the casino, in order to allow the Chairman an opportunity to consider the evidence presented at the informal hearing. On May 2, 1996, the Chairman rendered the decision on expedited review which is the subject of the present appeal. The decision states:

> The closure order should not be rescinded. The basis for our decision is as follows:
>
> 1. The [Tribe] raised a number of arguments with regard to compact negotiations between the Tribe and the State of Nebraska. These arguments were supported by documents which raise serious concerns about the fairness of this process. Despite the equitable considerations raised by the Tribe, the fact remains that [the] Commission does not have the authority to address issues related to [the] process by which tribal-state compacts are negotiated. Under [IGRA] it is the Secretary of the Interior who is responsible for approving tribal-state compacts. Accordingly, the arguments raised by the Tribe concerning compact negotiations with the State of Nebraska do not represent a basis for rescinding the closure order.
>
> 2. The Tribe made a highly persuasive presentation with regard to the importance of the jobs generated at the casino as a result of gaming and the critical needs being met by the gaming revenues. I fully recognize how significant

> these considerations are to a tribe which currently has an unemployment rate of 74%. Unfortunately, despite the obvious good they are doing, the casino revenues are being generated from Class III gaming activities which are not authorized by a tribal-state compact. Such activities constitute a substantial violation of the Commission's regulations which authorize the issuance of a closure order. *See* [25 C.F.R.] 573.6(a)(11).[4] The [Tribe], should it choose to do so, will have an opportunity to attempt to assert these equitable arguments before the full Commission in the course of its appeal.
>
> Given current circumstances in the State of Nebraska, I have no choice but to order the closure of the Class III gaming activity presently being conducted in the [Tribe's] casino. It is my hope that doing so will result in a change of circumstances which ultimately will permit Class III gaming activities to resume pursuant to a compact between the Tribe and the State of Nebraska.

(Decision at 1-2).

The Tribe apparently closed its casino on May 5, 1996. It appealed the Chairman's decision under 25 C.F.R. Part 577. Pursuant to a request from the Commission, the Director of the Department's Office of Hearings and Appeals appointed a Presiding Official to conduct a hearing for, and issue a recommended decision to, the Commission. The Tribe filed a supplemental statement and additional supplemental statement, and requested a hearing and the issuance of subpoenas.

On June 7, 1996, the Tribe and the Chairman submitted a joint stipulation as to some of the matters raised in

this appeal. In an order dated June 7, 1996, the Presiding Official scheduled a hearing for June 14, 1996, in Omaha, Nebraska, and established procedures for the hearing and for the filing of post-hearing briefs. In a separate order issued on June 7, 1996, the Presiding Official recommended the issuance of only the subpoena for Thomas Lusby, Special Agent in Charge, Federal Bureau of Investigation, (FBI), Omaha, Nebraska. After being notified by the Omaha Chief Division Counsel, FBI, that the testimony the Tribe sought from Mr. Lusby was privileged under 28 C.F.R. 16.26(b)(4) and (b)(5), and that the FBI would "object, resist and refuse to comply with" any subpoena, on June 10, 1996, the Commission denied the Tribe's request for subpoenas.

On June 12, 1996, the Tribe orally renewed its request for subpoenas for all individuals other than Lusby. Pursuant to an agreement between the Tribe and the Chairman, the hearing went forward as scheduled, but the Tribe was permitted an opportunity to submit additional evidence through affidavits which were to be filed on or before June 27, 1996, the date allowed for the filing of initial post-hearing briefs. The Chairman filed a timely post-hearing brief, but the Tribe did not file a brief or affidavits, and did not request an extension of time. By order dated June 28, 1996, the Presiding Official closed the record.

The June 7, 1996, order had allowed the filing of reply briefs on or before July 2, 1996. On July 2 the Presiding Official was notified that the Tribe intended to file a document by facsimile transmission. On the instruction of the Presiding Official, the document was sent by overnight delivery. The document, entitled "Reply Brief,"

was received on July 3, 1996. The filing contained no reference to the June 28, 1996, order closing the record.

Upon examination, the "Reply Brief" proved to set out the Tribe's argument in chief. The contentions raised in the brief have been raised before, although not in precisely the same manner or with precisely the same argumentation and/or support. These contentions are addressed in this recommended decision. However, the new argumentation and support, which should have been filed by June 27, 1996, are not considered. Because of this, the Chairman has not been granted an opportunity to respond to the Tribe's untimely initial post-hearing brief.[5]

## Discussion and Conclusions

The Tribe's primary argument following *Seminole* is that Congress would not have required tribes to negotiate compacts with states if it had known that the Federal court enforcement provisions would be held unconstitutional. Arguing that Congress would not have "impose[d] a requirement upon tribes that is impossible to attain" (Supplemental Statement at 2-3), the Tribe contends that

> any severance analysis performed on the IGRA can lead to only one of two conclusions: either the IGRA in its entirety must be stricken, or all of the provisions of the IGRA which make reference to a tribal-state compact for class III gaming must be stricken from the statute, including § 2710(d)(1)(C). In either case, once a severance analysis is performed as *required* by federal law, the IGRA's requirements for a tribal-state compact for class III gaming must be stricken. [Emphasis in original.]

(*Id.* at 4). The Tribe argues that "[w]ithout the requirement of a tribal-state compact as a prerequisite to class III gaming, neither the Chairman nor the Commission [has] the authority to issue a closure order" (*Id.* at 1-2).

This argument seeks a determination of how much of IGRA remains after the Supreme Court's decision in *Seminole*. The Commission is part of the Executive Branch of government and, as such, lacks authority to declare an act of Congress unconstitutional. *See, e.g., Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 28 IBIA [Interior Board of Indian Appeals] 247, 250 (1995). That authority resides in the Judicial Branch. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). When a Federal court holds part of a statute unconstitutional, it normally engages in a severance analysis, in order to determine how much, if any, of the statute can stand without the unconstitutional provisions. Ultimately, this decision rests with the Supreme Court as the final arbiter of the constitutionality of acts of Congress. However, under the rather unique circumstances arising after the decision in *Seminole*, the Commission has been placed in the difficult position of being responsible for enforcing an act which has, essentially, been placed into limbo because of the lack of a definitive judicial severance analysis.

At least one case is pending in Federal court in which the plaintiff argues, as does the Tribe here, that, after *Seminole*, IGRA as a whole must be stricken or all references to class III gaming must be severed from it. *See Ponca Tribe of Oklahoma v. Oklahoma*, No. 92-6331 (10th Cir.). But for the time constraints imposed by 25 U.S.C. § 2713(b)(2)[6] as implemented in 25 C.F.R. Part 577, the

wise course of action might be to stay this case and await further guidance from the courts.[7]

We find that the Commission lacks authority to enter the decision the Tribe seeks; *i.e.*, to conclude either that IGRA is no longer functional or to sever any portion of it that has not specifically been held unconstitutional.[8] As part of the Executive Branch of government, the Commission's responsibility is to uphold and enforce the laws passed by Congress unless and until it is informed by the Federal courts that a particular law is invalid, or that specific provisions of the law cannot be enforced. Thus, unless and until the Federal courts define the parameters of what is left of IGRA after *Seminole*, or Congress amends the act to take that holding into account, the Commission must enforce all of the act except the Federal court enforcement provisions – a part of the act which did not fall under the Commission's jurisdiction in the first instance.[9] Therefore, for Commission purposes, only the Federal court enforcement provisions of IGRA, 25 U.S.C. § 2710(d)(7)(A)(i) and parts of 25 U.S.C. 2710(d)(7)(B), are unconstitutional. All other provisions, including the compacting process set out in 25 U.S.C. § 2710(d)(3), remain in full force and effect.[10]

Having concluded that the compacting process is still in effect, the Commission must reach the Tribe's remaining arguments.

The Tribe argues that the Chairman has discretion to rescind his order and that his statement that he "ha[d] no choice" but to continue the order is in error. This argument is based in part on 25 C.F.R. 573.6(a), which provides that "the Chairman *may* issue an order of

temporary closure" (emphasis added) under the circumstances enumerated in the regulation.

The Tribe is correct that the Chairman has discretion in issuing an order of temporary closure. However, that discretion is akin to what is commonly termed "prosecutorial discretion." In *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), the Supreme Court discussed whether it would review an agency decision not to take enforcement action under a statute, noting that:

> an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, §3.

The Court observed that, in contrast, when an agency takes enforcement action, the action is subject to judicial review.

The decision on whether or not to terminate an enforcement action already undertaken is similarly committed to the agency's discretion. The Chairman's statement represents his exercise of discretion in determining that the Tribe had not presented sufficient grounds for him to terminate the enforcement action he had begun. The particular phraseology used by the Chairman in stating his decision not to rescind the order of temporary closure does not constitute legal error.

The Tribe also argues that the closure of its casino violates the Federal trust responsibility, and that under

IGRA the Commission was intended to be a "shield to protect tribes and tribal government gaming" (Supplemental Statement at 21). The Senate Report recites the purposes of IGRA at page 3085:

> The purpose of the act is to provide a statutory basis for operating Indian gaming to promote economic development, to shield tribes from organized crime, to assure fairness to operators and players, and to establish a Federal regulatory authority for Indian gaming to meet congressional concerns.

It also discusses the powers of the Commission at page 3077:

> The Commission will have authority to: permanently close tribal games; enforce collection of civil fines; enforce tribal gaming ordinances; monitor all Indian gaming activities; inspect gaming premises; conduct background investigations of employees and contractors; access records, books and other documents and audit accounts; conduct any investigation necessary in connection with regulation of class II gaming; consult with law enforcement officials where appropriate; and request the U.S. Attorney General to conduct necessary criminal investigations.

In *Shakopee Mdewankanton Sioux Community v. Hope*, 798 F. Supp. 1399, 1407 (D. Minn. 1992), the tribe argued that the Commission's decision to classify keno as a class III, rather than a class II, game, "violates one of the stated purposes of [IGRA], which is to protect gaming as a means of generating tribal revenue * * * [and] violates a canon of construction holding that statutes passed for the

benefit of Indian tribes must be liberally construed, with doubts being resolved in the tribes' favor." The court stated:

> These arguments * * * ignore the fact that protecting gaming as a means of generating tribal revenue is not the sole purpose of the IGRA; that statute was also intended to meet congressional concerns regarding gaming, shield Indian gaming from organized crime and other corrupting influences, and assure that gaming is conducted fairly and honestly by both operators and players. * * * Thus, the purposes underlying the IGRA are both varied and possibly conflicting. To deem that any interpretation of the act that conflicts with the desires of some tribes is invalid would privilege one purpose of the statute over others. In addition, to the extent that the commission's rule protects the integrity of Indian gaming, it must be seen to advance and not hinder tribal interests. Gaming that is corrupt or inadequately regulated would not advance the statutory purpose of "promoting tribal economic development, self-sufficiency, and strong tribal governments."

*See also Sisseton-Wahpeton Sioux Tribe v. United States*, 804 F. Supp. 1199, 1209 (D.S.D. 1992). In affirming both *Shakopee* and *Sisseton-Wahpeton*, the Eighth Circuit stated: "In making this argument [concerning construction of statutes in favor of the Indians], the Tribes ignore the dual purpose behind IGRA. * * * The balance to be struck between competing statutory purposes is exactly the sort of determination that is best left to agency discretion" (*Shakopee Mdewakanton* [sic] *Sioux Community v. Hope*, 16 F.3d 261, 265 (8th Cir. 1994)).

The application of the trust responsibility – like that of other general rules developed in contexts in which the sole or primary Congressional purpose is clearly to benefit Indians – must be tempered by recognition of IGRA's multiple purposes and the Commission's multiple responsibilities. Therefore, the trust responsibility requires the rescission of the order of temporary closure.

The Tribe contends that the Chairman should have rescinded his order of temporary closure for "good cause" pursuant to 25 CFR 573.6(c)(3). This section provides for an expedited review proceeding before the Chairman on an order of temporary closure. Subparagraph (3) states:

> Whether or not a respondent seeks informal expedited review under this paragraph, within thirty (30) days after the Chairman serves an order of temporary closure the respondent may appeal the order to the Commission under part 577 of this chapter. *Otherwise, the order shall remain in effect unless rescinded by the Chairman for good cause.* [Emphasis added.]

The Tribe argues that this regulation allows the Chairman to consider equitable arguments as to why the order should be rescinded, and asks for consideration of its equitable arguments that the Governor failed to negotiate in good faith, class III gaming and illegal gaming are rampant in the State of Nebraska, and class III gaming is needed on its reservation to combat adverse economic conditions, including, but not limited to, an extremely high unemployment rate and the lack of other opportunities for generating jobs and revenue.

"Good cause" is not defined in the regulations. Only one reference to the "good cause" language appears in the preamble to the publication of the regulations in the *Federal Register*. The reference follows a comment concerning whether orders of temporary closure should be entered only "in situations where corrective actions are [not] more appropriate," and a comment that such an order should be lifted automatically "at any such earlier time that the tribe has voluntarily corrected the alleged substantial violation." The reference states only: "Section 573.6(c)(3) does provide that the Chairman may rescind an order of temporary closure "for good cause." 58 FR 5802, 5837 (Jan. 22, 1993).

The Chairman raises two objections to this argument. First, he argues that "good cause" means a mistake or error of fact in the issuance of the order of temporary closure. This reading of "good cause" is too narrow. The context of the one comment concerning "good cause" in the *Federal Register* preamble demonstrates other types of considerations that could constitute "good cause."

The Chairman's second objection is that the Tribe has misread and misapplied 25 C.F.R. 576.3(c). He argues that the last sentence of the regulation provides that in the absence of either a request for expedited review or an appeal, the temporary closure order will remain in effect unless the Chairman finds there is good cause to rescind the order. The Chairman contends that once an appeal is filed, he lacks authority to rescind a temporary closure order because the matter is then before the full Commission.

The Chairman is correct that this matter has progressed beyond 25 C.F.R. 576.3(c). With the filing of its appeal under 25 C.F.R. Part 577, the Tribe came before the full Commission, and ended the Chairman's authority to act unilaterally. However, this finding does not necessarily mean that the Commission lacks authority to rescind the Chairman's order for "good cause," as one of many legal reasons under which the Commission might decide not to make the temporary closure order permanent.

Assuming *arguendo* that "good cause" continues to play a part in the full Commission's decision, the Tribe argues that "good cause" exists here because of the Governor's failure to negotiate in good faith and the economic conditions on its reservation. The materials in the administrative record and the Tribe's submissions tend to suggest that the Governor did not negotiate in good faith.[10] Furthermore, the administrative record fully supports the Tribe's contentions concerning the economic conditions on its reservation.

As the Chairman notes, nothing in IGRA suggests that the Chairman and the Commission are to weigh equitable considerations in deciding whether to issue a temporary closure order or whether to make such an order permanent. It appears that the reason for this is that Congress has already conducted the particular "good cause" analysis which the Tribe asks the Commission to undertake. The legislative history of IGRA shows that Congress was very aware of the oppressive economic conditions on many reservations, and of the benefits that could be realized with the influx of capital generated from gaming. It also shows, however, that Congress

believed the states had legitimate concerns about the conduct of class III gaming on Indian lands. In deciding to require a compact as a prerequisite to authorizing class III gaming, Congress engaged in the precise balancing of equities analysis that the Tribe seeks from the Commission. Congress' conclusion was that, no matter how much good gaming might do for a tribe, class III gaming would not be authorized without a compact. Therefore, we conclude that the order of temporary closure for "good cause" as presented in the Tribe's equitable arguments should not be rescinded.[11]

The Tribe also argues that the law does not require a person to do the impossible, and that the law – and, in particular, the law of the State of Nebraska – allows a person to break a specific statute when to do so would prevent the occurrence of a greater evil. The Tribe contends that it is impossible for it to obtain a compact, and that the law would allow it to violate the compact provisions of IGRA in order to prevent the greater evil of "extreme poverty, starvation, lack of medical care, and lack of adequate educational facilities" on its reservation (Supplemental Statement at 16).

These arguments are variations on the Tribe's equity argument. In essence, the Tribe contends that it should not have to obey IGRA because the Governor will not negotiate a compact and because of the economic conditions on its reservation. As discussed *supra*, Congress was aware of the possibility that tribes might not be able to negotiate compacts, and clearly intended that, in such an instance, class III gaming would not be authorized, regardless of the good it might accomplish. Congress has answered the Tribe's argument. Therefore, we do not

accept the Tribe's argument that it should be excused from compliance with IGRA because it is not possible for it to secure a compact or that it should be allowed to violate IGRA because it is preventing a greater evil.

The Tribe has also argued that Congress did not intend IGRA to be used as a tool to prevent tribes from engaging in gaming. This, however, is the wrong question. The question is under what circumstances did Congress intend to authorize tribes to engage in class III gaming. Once again, it is clear that Congress intended to authorize class III gaming only when a compact was in effect. Therefore, we shall not grant any relief based on this argument.

The Tribe contends that gaming – and illegal gaming – is prevalent in the State of Nebraska. Assuming *arguendo* that this contention is true, the Commission has limited jurisdiction. It does not have authority to enforce state gambling laws, to enforce any Federal law other than IGRA, or to initiate enforcement proceedings in regard to gaming occurring on any lands other than Indian lands. If there are violations of State and/or Federal gaming laws in Nebraska, that is a matter for the State's Attorney General and/or the United States Attorney, not the Commission. The fact that there is, or may be, illegal gaming occurring off Indian lands in Nebraska does not excuse a violation of IGRA on Indian lands, or prevent the Commission from taking action to enforce the Federal law under its jurisdiction. Therefore, we do not accept the Tribe's argument based on alleged illegal gaming occurring off Indian lands in the State of Nebraska.

Finally, appellant filed objections to the recommended decision. We have reviewed those objections and concluded that appellant raises no objections which would change our decision.[12]

It is ordered that the Chairman's May 2, 1996, order of temporary closure is made permanent.

July 31, 1996
Dated

/s/ Harold A. Monteau
Harold A. Monteau
Chairman

/s/ Philip N. Hogen
Philip N. Hogen
Commissioner

/s/ Tom Foley
Tom Foley
Commissioner

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[1] All further citations to the *United States Code* are to the 1994 edition.

[2] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

[3] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] Section 573.6 provides in pertinent part:

"(a) [T]he Chairman may issue an order of temporary closure of all or part of an Indian gaming operation if one or more of the following substantial violations are present:

* * *

"(11) A gaming operation operates class III games in the absence of a tribal-state compact that is in effect, in violation of 25 U.S.C. 2710(d)."

[5] In a footnote in his post-hearing brief, the Chairman stated that on June 24, 1996, the Tribe filed a motion for a temporary restraining order (TRO) in district court, seeking to reopen its casino. Other information verbally provided by counsel to the Chairman was that the court could not immediately schedule a hearing on the TRO motion and, on or about June 28, 1996, the Tribe reopened its casino. The Government filed a motion for a TRO seeking enforcement of the Chairman's temporary closure order. A hearing was held on both TRO motions on July 9, 1996. Both motions were denied.

On July 11, 1996, the Tribe filed a motion waiving the hearing deadlines set out in 25 CFR 577.4, and asking that this proceeding be reopened:

"to allow for (a) the introduction of the [TRO hearing] testimony of Messrs. Balka, Bogatz, Quinn and Oelschlager [concerning the Governor's negotiating position]; (b) the introduction of the June 3, 1996 letter of the Superintendent of the Winnebago Agency [Bureau of Indian Affairs] citing the failure of the State of Nebraska to negotiate in good faith; (c) the introduction of the letter from the Secretary of the Interior's Office informing the Tribe that the Secretary had not promulgated regulations and would not accept proposals for Class III compacts; (d) for consideration of the case, *Gaming Corporation of America v. Dorsey & Whitney*, [Nos. 95-3441 and 95-3693 (8th Cir. June 27, 1996)]; and (e) to allow this matter to be re-briefed and reargued."

Based on the discussion *infra*, the motion to reopen this proceeding is denied. Giving the Tribe the benefit of every doubt and assuming that all of the supplemental information the Tribe states it wishes to introduce is true and correct, consideration of that information would not alter the recommended decision.

[6] Section 2713(b)(2) provides:

"Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe * * * involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing,

the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation."

[7] Such a course of action might conceivably be consistent with the Tribe's July 11, 1996, motion to, essentially, recommence this proceeding. If that motion were granted, this matter might still be pending when the courts begin to address the fate of IGRA.

[8] Presumably, if the Commission, or ultimately the courts, were to hold that IGRA was non-functional or that the entire compacting process must be severed, class III Indian gaming would be returned to the position it was in prior to the enactment of IGRA. It does not appear that a return to pre-IGRA gaming would assist the Tribe here. The evidence in the record in this case shows that the Tribe was operating slot machines. Prior to the enactment of IGRA, slot machines were generally illegal in Indian country under the Johnson Act, 15 U.S.C. §§ 1171, 1175.

[9] At the June 14, 1996, hearing, the Tribe submitted a copy of a May 30, 1996, proposed compact which it had submitted to the Secretary, apparently following the circuit court's discussion in *Seminole Circuit*. The Tribe's July 3, 1996, "Reply Brief" contains a June 25, 1996, letter from the Counselor to the Secretary, returning the proposed compact. The letter stated that until the completion of the rulemaking proceeding initiated through the *Federal Register* publication mentioned *supra*, the Department would not make any decisions on this issue. The Tribe's July 11, 1996, motion to reopen seeks to introduce this letter.

The Commission lacks authority to determine what authority the Secretary may have under 25 U.S.C. § 2710(d)(7)(B)(vii). This determination rests with the Secretary and/or the Federal courts.

[10] In its July 11, 1996, motion to reopen, the Tribe sought to provide testimony from State officials which it believes would support its contention that the Governor failed to negotiate in good faith.

[11] This argument implicitly asks the Commission to enforce the requirement that states negotiate in good faith by

refusing to close any class III gaming facility being operated without a compact when the state involved failed to negotiate in good faith. Congress, however, placed enforcement of that provision with the Federal courts and the Secretary, not the Commission. *Seminole* removes the Federal courts from their enforcement role. If the Secretary's authority is also removed, there would be a gap in IGRA's enforcement provisions. However, the responsibility for filing that gap would rest with Congress through the enactment of appropriate legislation – not with the Commission through the arrogation [sic] of authority it was not otherwise given.

[12] Appellant alleges that the State of Nebraska is and has been operating Class III gaming on Indian lands within the State in the absence of a tribal-state compact. That allegation will be referred to the proper authorities.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this **1st** day of **August 1996**, served a copy of the foregoing **Decision of National Indian Gaming Commission Denying Respondents Request for Stay** by U.S. Postal Service Certified Mail to the individuals listed below:

John Peebles
Conly J. Schulte
Peebles & Evans, P.C.
12100 W. Center Rd. #519
Omaha, Nebraska 68144-3960

/s/ Tina M. Bloomquist (signature)
Tina Bloomquist, Staff Assistant
on behalf of the National
Indian Gaming Commission

**UNITED STATES COURT OF APPEALS**

FOR THE EIGHTH CIRCUIT

| | | |
|---|---|---|
| No. 97-1546NEO | * | |
| United States of America, | * | |
| Appellant, | * | Order Denying Petition |
| v. | * | for Rehearing and |
| | * | Suggestion for |
| Santee Sioux Tribe | * | Rehearing En Banc |
| of Nebraska, | * | |
| a Federally Recognized | * | |
| Indian Tribe | * | |
| Appellee. | * | |

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 2, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

18 U.S.C. § 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the

Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

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25 U.S.C. § 2701. Findings

The Congress finds that –

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

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25 U.S.C. § 2703. Definitions

* * *

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means –

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that –

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include –

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * *

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25 U.S.C. § 2710. Tribal gaming ordinances

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that –

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

* * *

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on

which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands

subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

* * *

**Neb.Rev.St. § 9-701. Conduct of gift enterprises; conditions; prohibited acts; violation; penalties; venue; enforcement.**

(1) For purposes of this section:

(a) Gift enterprise shall mean a contest, game of chance, or game promotion which is conducted within the state or throughout the state and other states in connection with the sale of consumer or trade products or services solely as business promotions and in which the elements of chance and prize are present. Gift enterprise shall not include any scheme using the game of bingo or keno; any non-telecommunication-related, player-activated electronic or electromechanical facsimile of any game of chance; or any slot machine of any kind. A gift enterprise shall not utilize pickle cards as defined in section 9-315. Promotional game tickets may be utilized subject to the following:

(i) The tickets utilized shall be manufactured or imprinted with the name of the operator on each ticket;

(ii) The tickets utilized shall not be manufactured with a cost per play printed on them; and

(iii) The tickets utilized shall not be substantially similar to any type of pickle card approved by the Department of Revenue pursuant to section 9-332.01; and

(b) Operator shall mean any person, firm, corporation, association, governmental entity, or agent or employee thereof who promotes, operates, or conducts a gift enterprise. Operator shall not include any nonprofit organization or any agent or employee thereof.

(2) Any operator may conduct a gift enterprise within this state is accordance with this section.

(3) An operator shall not:

(a) Design, engage in, promote, or conduct a gift enterprise in connection with the promotion or sale of consumer products or services in which the winner may be unfairly predetermined or the game may be manipulated or rigged;

(b) Arbitrarily remove, disqualify, disallow, or reject any entry;

(c) Fail to award prizes offered;

(d) Print, publish, or circulate literature or advertising material used in connection with such gift enterprise which is false, deceptive, or misleading; or

(e) Require an entry fee, a payment or promise of payment of any valuable consideration, or any other consideration as a condition of entering a gift enterprise or winning a prize from the gift enterprise, except that a contest, game of chance, or business promotion may require, as a condition of participation, evidence of the purchase of a product or service as long as the purchase price charged for such product or service is not greater than it would have been without the contest, game of chance, or business promotion. For purposes of this section, consideration shall not include (i) filling out an entry blank, (ii) entering by mail with the purchase of postage at a cost no greater than the cost of postage for a first-class letter weighing one ounce or less, or (iii) entering by a telephone call to the operator of or for the gift enterprise at a cost no greater than the cost of postage for a first-class letter weighing one ounce or less. When the only method of entry is by telephone, the cost to the

entrant of the telephone call shall not exceed the cost of postage for a first-class letter weighing one ounce or less for any reason, including (A) whether any communication occurred during the call which was not related to the gift enterprise or (B) the fact that the cost of the call to the operator was greater than the cost to the entrant allowed under this section.

(4)(a) The Department of Revenue may adopt and promulgate rules and regulations necessary to carry out the operation of gift enterprises.

(b) Whenever the department has reason to believe that a gift enterprise is being operated in violation of this section or the department's rules and regulations, it may bring an action in the district court of Lancaster County in the name of and on behalf of the people of the State of Nebraska against the operator of the gift enterprise to enjoin the continued operation of such gift enterprise anywhere in the state.

(5)(a) Any person, firm, corporation, association, or agent or employee thereof who engages in any unlawful acts or practices pursuant to this section or violates any of the rules and regulations promulgated pursuant to this section shall be guilty of a Class II misdemeanor.

(b) Any person, firm, corporation, association, or agent or employee thereof who violates any provision of this section or any of the rules and regulations promulgated pursuant to this section shall be liable to pay a civil penalty of not more than one thousand dollars imposed by the district court of Lancaster County for each such violation which shall accrue to the permanent school

fund. Each day of continued violation shall constitute a separate offense or violation for purposes of this section.

* * *

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**Neb.Rev.St. § 28-1101. Terms, defined.**

* * *

(5) Gambling device shall mean any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value, free games redeemable for something of value, instant-win tickets which also provide the possibility of participating in a subsequent drawing or event, or tickets or stubs redeemable for something of value, except as authorized in the furtherance of parimutuel wagering. Supplies, equipment, cards, tickets, stubs, and other items used in any bingo, lottery by the sale of pickle cards, other lottery, raffle, or gift enterprise conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small

Lottery and Raffle Act, the State Lottery Act, or section 9-701 are not gambling devices within this definition;

* * *

---

**Neb.Rev.St. Sec. 28-1107. Possession of a gambling device; penalty; exemption.**

(1) A person commits the offense of possession of a gambling device if he or she manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

* * *

---

**Neb.Rev.St. Sec. 28-1113. Article, how construed.**

Nothing in this article shall be construed to:

* * *

(2) Prohibit or punish the conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise when conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska

Small Lottery and Raffle Act, the State Lottery Act, or section 9-701.

**UNITED STATES COURT OF APPEALS**

FOR THE EIGHTH CIRCUIT

| | | |
|---|---|---|
| No. 97-1546NEO | * | |
| United States of America, | * | |
| Appellant, | * | Appeal from the United States District Court for the District of Nebraska |
| v. | * | |
| Santee Sioux Tribe of Nebraska, a Federally Recognized Indian Tribe | * | |
| Appellee. | * | |

Appellee's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 5/18/98. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

April 17, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

FILED
AUG 14 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1839

# In the Supreme Court of the United States

OCTOBER TERM, 1997

SANTEE SIOUX TRIBE OF NEBRASKA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. 2710(d)(1)(B), prohibits Indian Tribes from conducting forms of Class III gaming that state law completely prohibits.

2. Whether the compacting provisions of IGRA are valid and enforceable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).

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# In the Supreme Court of the United States

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No. 97-1839

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 135 F.3d 558. The opinions of the district court (Pet. App. 18-27, 29-37) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 29, 1998. A petition for rehearing was denied on April 2, 1998. Pet. App. 75. The petition for a writ of certiorari was filed on May 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701-2721; 18 U.S.C. 1166-1168, established a framework for regulating Indian gaming. IGRA created three classes of Indian gaming, 25 U.S.C. 2703(6)-(8). Class III gaming, at issue here, includes house-banked card games, casino games, slot machines, electronic and electromechanical facsimiles of any game of chance, sports betting, parimutuel wagering, and lotteries. 25 U.S.C. 2703(7)(B); 25 C.F.R. 502.4. IGRA allows Class III gaming activities on tribal lands as long as such activities are: (1) authorized under a tribal ordinance or resolution; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (3) conducted in conformance with a Tribal-State compact. 25 U.S.C. 2710(d)(1). The National Indian Gaming Commission has authority to monitor and regulate Class III gaming. 25 U.S.C. 2704-2708.

2. The Santee Sioux Tribe (petitioner) began negotiations with the State of Nebraska seeking to conduct Class III gaming on its tribal lands. Pet. App. 2. After failing to reach an agreement with the State, petitioner opened a Class III gaming facility on its Reservation that offered video slot machines, video poker machines, and video blackjack machines. *Ibid.*

The Chairman of the National Indian Gaming Commission determined that petitioner's Class III gaming activities violated IGRA, and ordered petitioner to close its casino. Pet. App. 3-4. After receiving an extension of the closure date, petitioner closed its casino, but appealed the Chairman's order to the full Commission. *Id.* at 4.

Petitioner brought suit in the United States District Court for the District of Nebraska seeking an order that the compacting provisions of IGRA are unconstitutional and that the State of Nebraska regulates rather than prohibits Class III gaming. Pet. App. 4. Petitioner also sought an order enjoining the Commission and the United States Department of Justice from enforcing gaming laws against petitioner. *Ibid.* Petitioner then reopened its casino. *Ibid.*

In response, the United States filed suit against petitioner in the same district court requesting a declaratory judgment that petitioner's operation of video slot, blackjack, and poker machines violates federal and state law. Pet. App. 4. The United States also sought enforcement of the Chairman's closure order, and an injunction to stop petitioner's gaming in the absence of a valid Tribal-State compact. *Ibid.* The two suits were consolidated. *Ibid.*

3. The district court dismissed petitioner's suit, holding that the Chairman's temporary closure order was not final agency action. Pet. App. 21-22. The district court also dismissed the government's suit. *Id.* at 25-26. The court held that the United States did not have authority to enforce the Chairman's closure order. *Id.* at 25. The court further held that injunctive relief was not otherwise available because courts do not generally enjoin a crime and the exception to that principle for cases in which there is statutory authority to issue injunctive relief did not apply. *Id.* at 26.

The full Commission thereafter upheld the Chairman's closure order, and the United States sought leave to file a supplemental pleading in the district court concerning the Commission's action. Pet. App.

5. The district court denied the motion, on the ground that the Commission had neither authorized nor directed the United States to seek injunctive relief to enforce its order. *Ibid.*

4. The court of appeals reversed. Pet. App. 1-17. The court held that the Attorney General of the United States had authority under 28 U.S.C. 516 to seek enforcement of the Commission's closure orders, and that the district court should have enforced those orders. Pet. App. 5-8. The court also held that, independent of the government's authority to seek enforcement of the Commission's closure order, the United States was entitled to injunctive relief to prevent the operation of petitioner's Class III gaming activities. *Id.* at 11-16. The court noted that 18 U.S.C. 1166(a) incorporates state law prohibitions on Class III gaming, as well as state law remedies for violations of those prohibitions. Pet. App. 11-12, 14-15. Finding that the forms of Class III gaming conducted by petitioner "are illegal in Nebraska," *id.* at 12, and that "injunctive relief is available to halt illegal gambling activity under Nebraska State law," *id.* at 15, the court concluded that "the District Court erred in refusing to grant the government's request for an order enjoining [petitioner's] gaming activities," *id.* at 16.

Finally, the court of appeals concluded that it was unnecessary to address petitioner's contention that IGRA's compacting provisions are invalid following *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). Pet. App. 16. The court reasoned that, under 25 U.S.C. 2710(d)(1)(B), the State is not required "to negotiate with respect to forms of gaming it does not presently permit." Pet. App. 16.

## ARGUMENT

1. a. Petitioner contends (Pet. 10-11) that certiorari should be granted to review the court of appeals' holding that a State is not required by IGRA to negotiate over forms of gaming that it regulates rather than prohibits. The court of appeals, however, did not hold that a State need not negotiate over forms of gaming that it merely regulates. Instead, it held that a State need not negotiate over forms of gaming that it prohibits. Pet. App. 16. Finding it "undisputed that petitioner is operating video poker, blackjack, and slot machines in its gaming facility," *id.* at 12, and determining that "[those] forms of gambling are illegal in Nebraska," *ibid.*, the court concluded that the State was not required to negotiate with petitioner concerning such gaming, *id.* at 16.

The court of appeals' holding that a State need not negotiate over a form of gaming that its laws prohibit is correct. Under 25 U.S.C. 2710(d)(1)(B), "Class III gaming activities shall be lawful on Indian lands only if such activities are * * * located in a State that permits such gaming for any purpose by any person, organization, or entity." That statutory text makes it unlawful for Tribes to operate forms of Class III gaming that state law completely prohibits. A State therefore has no duty to negotiate with respect to those forms of gaming.

Petitioner contends (Pet. 11 & n.8) that Nebraska statutes permit the forms of gaming petitioner conducts, subject to regulation. As the court of appeals determined, however, that contention is "not well taken given the uniform prohibition of these devices under the State's statutory scheme." Pet. App. 13. In any event, petitioner's contention that the court

below misinterpreted Nebraska law does not warrant this Court's review.

b. Petitioner contends (Pet. 8-18) that review is warranted in order to resolve a conflict among the circuits concerning a State's duty to negotiate under IGRA. There is, however, no conflict on the question resolved by the court of appeals in this case. The two appellate courts that have addressed the question have both held that a State has no duty to negotiate with respect to a form of gaming that its laws absolutely prohibit. *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) (State is not required to negotiate "with respect to forms of gaming it does not presently permit"); *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) ("We agree with the approach taken by the Eighth Circuit. IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming."), cert. denied, 117 S. Ct. 2508 (1997).

*Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024, 1033 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991), relied upon by petitioner (Pet. 12-13), holds that a State has a duty to negotiate with respect to forms of gaming that its laws permit, albeit subject to extensive regulation. There is no conflict between that decision and the holding of the court of appeals in this case that a State has no duty to negotiate with respect to forms of gaming that its laws absolutely forbid.

*Citizen Band Potawatomi Indian Tribe* v. *Green*, 995 F.2d 179, 180-181 (10th Cir. 1993), also cited by petitioner (Pet. 15-16), involved the construction of a different provision of IGRA—25 U.S.C. 2710(d)(6).

That provision creates an exception to the prohibition in the Johnson Act on the use of gambling devices. The exception applies to gaming conducted pursuant to a Tribal-State compact that is entered into by a State "in which gambling devices are legal." See 25 U.S.C. 2710(d)(6). Because Oklahoma law prohibited the possession of all gambling devices, the Tenth Circuit held that the exception did not apply. 995 F.2d at 181. That decision does not address the question presented in this case—whether a State has a duty under IGRA to negotiate with respect to particular forms of gaming that its laws prohibit. The holding of the court below that a State has no such duty does not conflict with the decision of any other circuit.

Last year, this Court denied a petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Rumsey Indian Rancheria*, in which the Tribes made the same claim of a conflict among the decisions of the courts of appeals on which petitioner relies here. *Sycuan Band of Mission Indians* v. *Wilson*, 117 S. Ct. 2508 (1997). There is no reason for a different disposition of the petition here.

2. Petitioner also contends (Pet. 21-25) that the Class III compacting provisions of IGRA cannot be enforced in light of the holding in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that a State may assert immunity from a suit alleging that it has failed to negotiate in good faith. That contention does not warrant review. The court of appeals declined to address that contention, on the ground that petitioner not only has been conducting Class III gaming without a compact, but that in doing so it has also been operating forms of gaming that are illegal under Nebraska law. Pet. App. 16. The court of appeals did not err in that respect.

IGRA not only prohibits Class III gaming without a Tribal-State compact; it also independently prohibits the operation of forms of Class III gaming that are illegal under state law. 25 U.S.C. 2710 (d)(1)(B), (C). Because Nebraska law absolutely forbids the forms of gaming conducted by petitioner, an injunction prohibiting such gaming was appropriate, whether or not the separate prohibition against gaming without a compact may be enforced against a Tribe after *Seminole Tribe*. The court of appeals therefore correctly concluded that it was unnecessary to decide in this case whether the prohibition against uncompacted gaming remains valid and enforceable after *Seminole Tribe*.

Petitioner's reliance on *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998), is misplaced. In that case, the United States sought to enjoin a Tribe's Class III gaming operation solely on the ground that it was being conducted without a Tribal-State compact. *Id.* at 1298. The Ninth Circuit held that, in light of *Seminole Tribe*, the prohibition against gaming without a compact could not, on the record before the court in that case, serve as the foundation for a preliminary injunction prohibiting the Tribe from continuing to conduct its gaming operation. *Id.* at 1301. The Ninth Circuit did not, however, address whether the separate prohibition against the operation of forms of gaming that are illegal under state law may serve as the basis for an injunction against such gaming. Instead, it left that issue open. *Ibid.* There is therefore no conflict between *Spokane Tribe* and the decision below.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT, U.S.

No. 97-1839

In The

# Supreme Court of the United States

October Term, 1997

SANTEE SIOUX TRIBE OF NEBRASKA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

### I. THE CIRCUIT COURTS OF APPEAL HAVE ISSUED CONFLICTING DECISIONS OVER THE SCOPE OF GAMING SUBJECT TO TRIBAL-STATE COMPACT NEGOTIATIONS.

Respondent asserts that all federal circuits uniformly agree that, "A state has no duty to negotiate with respect to a form of gaming that its laws absolutely prohibit." Brief in Opposition at 6. Petitioner does not take issue with this, as the Indian Gaming Regulatory Act ("IGRA") does not require states to negotiate over forms of gaming that are absolutely prohibited by state "criminal law and public policy." 25 U.S.C. §§ 2701(5), 2710(d)(1)(B). However, under the court of appeals' decision in this case, even though a state does not prohibit a form of gaming as a matter of criminal law and public policy, an Indian tribe can only conduct such gaming in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming.

Accordingly, there is a dispute among the federal circuits over whether, under IGRA, a state is obligated to negotiate with a tribe over an otherwise permitted form of gaming where the proposed gaming activity does not strictly conform to state regulatory law. *See* Pet. at 8-18. This conflict is over whether 25 U.S.C. § 2710(d)(1)(B) assimilates the entire state corpus of civil laws and regulations governing such gaming, or whether section 2710(d)(1)(B) requires a state to negotiate over the regulation of an otherwise permitted form of gaming. *Compare, Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024,

1030-31 (2d Cir. 1990), *with United States v. Santee Sioux Tribe*, 135 F.3d 558, 564 (8th Cir. 1998); Pet. App. 11-12.

In the present case, the Eighth Circuit Court of Appeals held that the gaming operated by Petitioner (player-activated electronic and electromechanical facsimiles of games of chance) "contraven[ed]" Nebraska law and was therefore not subject to negotiation under section 2710(d)(1)(B), despite the fact that this form of gaming is permitted by state gaming statutes. Pet. App. 11, 85-90; Pet. 11, n.8; Neb. Rev. Stat. § 9-701. The court of appeals stated:

> The Tribe's gaming activities violate the IGRA because they are conducted *in contravention of Nebraska law*. Under the IGRA, an Indian tribe may engage in a gaming activity on tribal lands only if that *specific gaming activity* is permitted under the laws of the state where the tribal land is located. *See* 25 U.S.C. § 2710(d)(1)(B).

Pet. App. at 11 (emphasis supplied).

The court of appeals' holding would assimilate the entire corpus of state laws and regulations governing gaming into any tribal-state gaming compact, because the court held that tribal gaming that would contravene *any* state law, including permissive regulatory laws, is not the proper subject of tribal-state compact negotiations under 25 U.S.C. § 2710(d)(1)(B). Furthermore, the decision below indicates that states need only negotiate over such "specific gaming" as is *affirmatively permitted* by state regulatory law. This decision directly contradicts IGRA, 25 U.S.C. § 2701(5), which provides:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming

> activity is not specifically prohibited by federal law and is conducted within a State which does not, *as a matter of criminal law and public policy, prohibit* such gaming activity.

(emphasis supplied).

The court of appeals' strained interpretation of section 2710(d)(1)(B) leads to results that Congress never intended. For instance, if state regulatory laws permit five-card poker, a state would not be required to negotiate with a tribe for the operation of seven-card poker, because seven-card poker is "in contravention of state law" and is not a "specific gaming activity" affirmatively permitted by state law. Thus, seven-card poker would be considered "prohibited" for purposes of IGRA, 25 U.S.C. § 2710(d)(1)(B), even though state law permits that form of gaming (i.e., poker). Under the decision below, the congressional requirement that tribal state compacts be negotiated would be rendered meaningless, for there would be nothing open to negotiation.

In the present case, among the Nebraska laws found to be "contraven[ed]" was Neb. Rev. Stat. § 9-701, a statute which actually *permits* the operation of "telecommunications related," "player activated electronic or electromechanical facsimiles of games of chance."[1] Pet. App.

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[1] After the court of appeals rendered its decision in this case, the Nebraska Attorney General issued an opinion which confirms that "player-activated electronic or electromechanical facsimiles of games of chance" are permitted under Neb. Rev. Stat. § 9-701 where such games are "telecommunications-related." Pet. Supp. App. at 4-5. Thus, to the extent that the court of appeals' decision may be read to hold that section 9-701

at 85; Pet. Supp. App. at 4-5. Games of chance (including gambling devices) operated pursuant to section 9-701 are *expressly exempted* from Nebraska criminal gambling laws. Neb. Rev. Stat. §§ 28-1101(5); 28-1113(2); Pet. App. 88-90. The gaming operated by Petitioner thus was not prohibited *as a matter of Nebraska criminal law and public policy.* Yet the court of appeals summarily concluded that the gaming operated by Petitioner was in contravention of state law, and further held that the state had no duty to negotiate with Petitioner for such gaming. Pet. App. 11, 16-17. The court of appeals apparently determined that the gaming operated by Petitioner did not comply with the regulatory terms and conditions imposed by section 9-701.[2] Thus, the court of appeals erroneously removed

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absolutely prohibits *all* "player-activated electronic and electromechanical facsimiles of games of chance," it is erroneous. In light of this intervening development, and particularly in light of the fact that the court of appeals relied on this erroneous ruling to avoid addressing federal questions raised by Petitioner, Petitioner respectfully submits this Court should grant the writ, vacate the judgment below, and remand for further proceedings.

[2] The court of appeals did not elaborate on exactly how Petitioner's gaming contravened section 9-701. However, considering that Nebraska criminal statutes exempt games of chance operated pursuant to section 9-701 from criminal prohibition, the court must have determined that the tribal games were not in compliance with the regulatory terms imposed by section 9-701, such as "telecommunications-related." The court of appeals thus erroneously focused on compliance with the regulatory conditions of the gaming instead of whether the form of gaming itself (i.e., player-activated electronic or electromechanical facsimiles of games of chance) is permitted by state law.

from tribal-state compact negotiations all proposed gaming that does not strictly comply with all state regulatory terms and conditions imposed on an otherwise permitted form of gaming.

This is not a case where the court of appeals merely "misinterpreted Nebraska law."[3] Brief in Opposition at 5-6. More importantly, this case is about the interpretation of *federal law*, 25 U.S.C. § 2710(d)(1)(B), and whether the court of appeals erroneously construed section 2710(d)(1)(B) to assimilate all state regulatory gaming laws; this case is about whether the court of appeals' narrow construction of section 2710(d)(1)(B) is contrary to decisions of other circuit courts of appeal. In fact, the court of appeals' restrictive approach in this case was expressly rejected by the Second Circuit Court of Appeals in *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-1031 (2d Cir. 1990), wherein the court held:

> Under the State's approach, on the contrary, even where a state does not prohibit Class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as

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[3] That this case involves much more than the mere misinterpretation of state law is also evident by the fact that the court of appeals relied on its misinterpretation to avoid addressing extremely important federal questions raised by Petitioner below, to wit: whether the Class III gaming provisions of IGRA are enforceable after this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *See infra*, pp. 7-9; Pet. at 21-25.

> the centerpiece of IGRA's regulation of Class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

There is a clear conflict among the federal circuits regarding the scope of gaming subject to negotiation pursuant to IGRA, 25 U.S.C. § 2710(d)(1)(B). Petitioner respectfully requests that this Court grant certiorari to resolve this conflict.

## II. THE CLASS III GAMING PROVISIONS OF IGRA ARE UNENFORCEABLE IN LIGHT OF THIS COURT'S DECISION IN *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*, 517 U.S. 44 (1996)

Petitioner asserted in the court below and in its Petition to this Court that, under this Court's standards for severing unconstitutional statutes, the Class III gaming provisions of IGRA are unenforceable in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Pet. 21-25. Respondent argues that this issue does not warrant review because the gaming sought to be operated by Petitioner is "illegal" under Nebraska law. Brief in Opposition at 7-8. However, Respondent's argument is only valid if IGRA, 25 U.S.C. § 2710(d)(1)(B), is interpreted to assimilate the entire corpus of state regulatory law. Furthermore, in a case identical to the present case, the Ninth Circuit Court of Appeals held that, in light of this Court's decision in *Seminole Tribe*, "The Class III gaming provisions [of IGRA] can't form the basis for an injunction against the Tribe." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998).

Respondent's attempt to distinguish *Spokane Tribe* is equally flawed. Respondent states, "In that case, the United States sought to enjoin a Tribe's Class III gaming operation solely on the basis that it was being conducted without a tribal-state compact," thereby implying that the present case was brought on some other basis. However, like *Spokane Tribe*, in the present case Respondent sought to enjoin Petitioner's gaming solely on the basis that the gaming was conducted in the absence of a tribal-state compact.[4]

Respondent also claims that 25 U.S.C. § 2710(d)(1)(B) is a "separate prohibition against the operation of forms of gaming that are illegal under state law," and argues that *Spokane Tribe* left open the issue of whether section 2710(d)(1)(B) may be utilized as an independent basis for an injunction against tribal gaming. Brief in Opposition at 8. Once again, Respondent's argument is only valid if section 2710(d)(1)(B) is interpreted to assimilate the entire corpus of state regulatory laws. Petitioner submits that Respondent's argument further demonstrates the need for this Court to review the issues raised by Petitioner in this case.

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[4] In fact, the administrative closure orders sought to be enforced against Petitioner were issued solely because the Tribe did not have a gaming compact with the State of Nebraska. Pet. App. at 44-46; 60. The only other basis for the Respondent's requested injunction was 18 U.S.C. § 1166, which was also the basis for the requested injunction in *Spokane Tribe*, and which, by its very terms, does not apply where there is a Class III gaming compact in effect. 18 U.S.C. § 1166(c); Pet. App. 76.

## CONCLUSION

For the above reasons, and the reasons set for the Petition for Writ of Certiorari, Petitioner respectfully requests that said Writ be granted.

Respectfully submitted,

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September 11, 1998

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April 9, 1998

M. Berri Balka
State Tax Commissioner
P.O. Box 94818
Lincoln, NE 68509-4818

RE: Lucky Shamrock Phone Card Dispensers

Dear Mr. Balka:

You have asked our opinion regarding the legality of electronic long distance phone card dispensers marketed under the name "Lucky Shamrock." As you describe these devices, they accept currency and dispense tickets for $1.00 each which may be used for two minutes of long-distance phone service. The tickets also display various monetary denominations arranged in three lines and three columns. The machine contãins a video display which spins or rolls after reading a barcode on the ticket, and then displays the monetary symbols aligned in the same order and sequence as they appear on the ticket.

The machine does not dispense any currency or otherwise provide any payment or accumulation of credits.

You have asked whether such a machine is an illegal gambling device under Nebraska statutes, and whether it is authorized under the Nebraska Gift Enterprise Act.

The term "gambling device" is defined in Neb. Rev. Stat. § 28-1101(5) (1995) as follows:

> Gambling device shall mean any device . . . used or usable for engaging in gambling. . . . Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding . . . tickets or stubs redeemable for something of value. . . .

Neb. Rev. Stat. § 28-1107(1) (1995) provides:

> A person commits the offense of possession of a gambling device if he or she manufactures, sells, transports, places, possess, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

Neb. Rev. Stat. § 28-1107 (1995) provides:

> Proof of possession of any gambling device shall be prima facie evidence of possession thereof with knowledge of its contents and character.

The Nebraska Supreme Court has said that there are three elements of gambling: chance, price, and a prize. *See, e.g., Baedaro v. Caldwell,* 156 Neb. 489 (1953); *State v. Two IGT Video Poker Games,* 237 Neb. 145 (1991); *State v.*

*Dodge City*, 238 Neb. 439 (1991); *State ex rel Spire v. Strawberries, Inc.*, 239 Neb. 1 (1991).

With respect to the Lucky Shamrock devices, the element of "price" or "consideration" is present, because the devices accept currency. The element of "chance" or "risk" is present, because the tickets which are dispensed contain a variety of monetary symbols, and the player does not control what monetary denominations are displayed on the ticket and the video screen or how those monetary denominations are aligned in the columns and rows. It is unclear whether the element of "prize" or "reward" is present, because the machines themselves do not pay the player. Instead, the player would need to seek payment elsewhere. The best evidence to prove the "prize" or "reward" element would be evidence of pay-off.

There is no doubt that the Lucky Shamrock devices are "usable" for gambling. Despite the presumption of guilt set forth in § 28-1109, a prosecutor would need to present some evidence that the party in possession of the device knew it was to be used in advancement of unlawful gambling activity in order to prosecute that person for possession of the device or to initiate forfeiture proceedings. *See, e.g., State v. Two IGT Video Poker Games*, 237 Neb. 145, 153-54 (1991).

Assuming that there is a pay-off for "winners" who use the devices, the question then becomes whether the devices and the pay-off are lawful as a "gift enterprise."

The Nebraska Constitution, Art. III, § 24, provides in part:

> The legislature may authorize . . . gift enterprises which are intended solely as business promotions . . . without profit to the promoter of such . . . gift enterprises.

The Nebraska Gift Enterprises Act, Neb. Rev. Stat. § 9-701 (1997) states in part:

> Gift enterprise shall mean a . . . game of chance . . . conducted . . . in connection with the sale of consumer or trade products or services solely as business promotions in which the elements of chance and prize are present. Gift enterprise shall not include . . . any non-telecommunication-related, player-activated electronic or electro-mechanical facsimile of any game of chance; or any slot machine of any kind.
>
> . . . .
>
> An operator shall not . . . [r]equire an entry fee . . . or any other consideration as a condition of entering a gift enterprise or winning a prize from the gift enterprise, except that a contest, game of chance, or business promotion may require, as a condition of participation, evidence of the purchase of a product or service as long as the purchase price charged for such product or service is not greater than it would have been without the contest, game of chance, or business promotion.

The Lucky Shamrock devices are player-activated electronic or electro-mechanical facsimiles of a game of chance. Although the legislative history of the Nebraska Gift Enterprises Act does not disclose the legislative intent behind the term "non-telecommunications-related", we cannot conclude that such a device is "telecommunications-related" simply because it may dispense

long-distance phone cards. There is no rational basis for treating the dispensing of long-distance phone cards differently from the dispensing of other products for purposes of the Act. Although it might be argued that the devices are gift enterprises if pay-off is available for the tickets, we do not find that argument to be persuasive. If the Lucky Shamrock devices *were* considered to be gift enterprises, then the operators of the devices would be in violation of § 9-701(3)(e) if the charge for the two minute long-distance phone service through the Lucky Shamrock devices were greater than the cost of such long-distance phone service directly from the provider or from other sources, or if the promoter of the enterprise were making a profit from it.

Additional investigation of the Lucky Shamrock devices is warranted to determine (1) whether and how players receive pay-off for winning tickets, (2) whether the tickets dispensed by the devices can be redeemed for two minutes of long-distance phone service and, if so, the company providing the phone service, and (3) the standard cost of two minutes of long-distance phone service from the provider or from others offering such phone cards. The answers to these questions will determine whether or not the owners and/or operators of the devices may be prosecuted for promoting gambling or possession of gambling devices or records; whether the devices may be subject to forfeiture; and, if the devices were viewed as gift enterprises, whether the owners of

the devices would be subject to prosecution for violation of the Nebraska Gift Enterprises Act.

Sincerely,

DON STENBERG
Attorney General

/s/ Laurie Smith Camp
Deputy Attorney General